87-1786

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRAINING BOARD,
Petitioner,

VS.

LINDA ELDREDGE, individually and on behalf of all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the practice of an apprentice training committee charged with sex discrimination, which allows applicants to solicit jobs directly with employers as one method to satisfy a first job prerequisite for admission, is sufficient to support a finding of liability for an alleged disparate underrepresentation of female trainees in the committee's program of instruction, as solely attributable to allowance of that method, when any relief encompassed by an order addressed only to the committee can, as a practical matter, be frustrated by nonparty employers whose decisions the committee is powerless to control.

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Petitioner Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee and Training Board respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1987.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The most recent opinion of the District Court for the Northern District of California, No. C 752062 JPV—C75-2062 (N.D.Cal.Oct.24,1985), which is unreported, also appears in the Appendix. The denial of the prior petition for writ of certiorari in this matter is reported at 459 U.S. 917

(1982). The Court of Appeals opinion from which earlier review was sought is reported at 662 F.2d 534 (9th Cir.1981), and the opinions of the District Court for the Northern District of California which precipitated that appeal appear at 83 F.R.D.136 (N.D.Cal.1979) and 440 F.Supp.506 (N.D.Cal.1977). All of the aforementioned opinions appear in the Appendix hereto.

JURISDICTION

Judgment of the Court of Appeals for the Ninth Circuit was entered on December 9, 1987. A timely petition for rehearing and suggestion of rehearing en banc was denied on February 17, 1988, and this petition for certiorari was filed within ninety days of that date. The court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Two women applicants for apprenticeship in the carpenters trade, Linda Eldredge and Christine Mazur, complained that the Carpenters 46 Northern California Counties Joint Apprenticeship Training Committee and Training Board, or JATC, encouraged sex discrimination by allowing applicants for apprenticeship to solicit employment through direct contact with building contractors. Ms. Mazur is no longer a party to this action. The JATC, defendant in this proceeding and petitioner here, had established a program accepting for classroom instruction any person who met minimal criteria and who could find a participating contractor to provide employment and the corresponding on-the-job training. Eldredge and Mazur complained that this program had a disparate impact because women had greater difficulty than men in obtaining employment in this fashion, and they invoked Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 et seq., to secure a system of referral which minimized employer selectivity in hiring. In May 1976, 13 of 3,200 carpenter apprentices in Northern California were women.

There was no issue of systemic discrimination in the process by which applicants were indentured by the JATC or claim that the

JATC applied neutral criteria in a discriminatory fashion. Instead, Eldredge and Mazur claimed that the JATC had a duty under Title VII to prevent or at least minimize the opportunity for discrimination by employers who hired apprentices.

The JATC contended it had no role in hiring or dispatch of apprentices and provided training to any person who met the minimal qualifications and was employed by a contractor signed to the carpenter's agreement. The authority granted in its trust agreement was limited by and subject to collective bargaining agreements which preserved for employers the sole right to select their employees. The JATC asserted that it had no power to require employers to hire or keep apprentices and that any order of the court directed against the JATC alone would not improve employment opportunities for women apprentices. It claimed that the individual signatory employers, as the alleged source of discrimination, could prevent realization of the intended relief.

The JATC is a joint labor-management committee established in 1963 under a trust agreement by various local unions of the United Brotherhood of Carpenters and Joiners of America and eleven contractor associations representing employers of carpenters in Northern California. The trust agreement empowered the JATC, acting as a board of trustees, to establish a program for educating and training journeymen or apprentices to supply a pool of skilled journeymen. The trust agreement provided, in Article VIII, Section 1, that in all matters pertaining to the authority of the JATC the terms of the controlling collective bargaining agreements prevailed:

> Section 1. Subject to the provisions of the Collective Bargaining Agreements, the rights and duties of all parties, including the Employers, the Signatory Associations, the Individual Employers, the Unions, the Local Unions, the District Councils, the Employees and Trustees, shall be governed by the provisions of this Trust Agreement and contracts procured or executed pursuant to this Trust Agree-

ment. (CR 217, Exhibit A, Apprenticeship and Training Trust Fund, page 65).[1]

Employment of union carpenters in Northern California was covered by two master agreements with different employer associations, whose terms were identical for purposes of this action. (CR 217, Exhibit A, pp. 17-18). Individual employers who were not builder members of one of those associations, known as "independents," signed "Memorandum Agreements" by which they promised to comply with the master agreement and to be bound by the corresponding trust agreements. Independents were responsible for approximately one-half of all hours reported for union carpenters in Northern California. Altogether, approximately 4800 employers were active under one or more of these agreements.

Under the collective bargaining agreements, an employer had complete freedom of selectivity in hiring and was permitted to reject any job applicant referred by the union for any reason, or to terminate any employee for cause which he deemed sufficient, providing that he did not unlawfully discriminate against an employee for reasons of union activity or on the grounds of age, sex, race, color or national origin. (CR 217, Exhibit A, Section 49, part 6, page 18). Hiring hall provisions of the agreement required an employer who needed carpenters to place a request with the local union or district council which operated a hiring hall in the particular geographical area. An employer could request by name workers who had been employed by him within the jurisdiction of a local union or district council within three years previously, and those would be given preference. He was also entitled to designate up to 25 percent of his employees notwithstanding hiring hall provisions.

In August 1974, the JATC, with the approval of the Division of Apprenticeship Standards, Department of Industrial Relations for the State of California, implemented a uniform affirmative action plan, Annex C-1, to cover each of 43 local committees organized under 10 district offices. To qualify under Annex C-1, an appli-

[1] "CR" refers to the clerk's record below by docket number.

cant was required to meet certain minimum qualifications not challenged in this case. Additionally, he had to obtain a position on a "new applicant referral list" established by a local committee in the area in which he wished to work, and to obtain employment with a signatory contractor. He obtained a position on the new applicant referral list by appearing in a district office at a date and time specified in notices circulated to numerous public agencies, news media and outreach programs. If the applicant met the minimum requirements, he was placed on the new applicant referral list in the order in which his application was received, until the number of persons on the list reached 150 percent of the number of openings for new apprentices that the local committee expected in the succeeding year. When the list was filled, the district coordinator reviewed it to determine whether it complied with goals and timetables for minority hiring established under Annex C-1, then posted the list and provided copies to each union dispatcher and various outreach programs.

Once on the referral list, an applicant could obtain employment either by contacting employers directly, known as the "hunting license," or by referral off of the new applicant referral list. Under the first procedure, an applicant could ask an employer to place a request by name with the local committee. The applicant was then indentured and sent to the local union for dispatch to the employer as a registered apprentice. The vast majority of all new carpenter apprentices located work in this manner.

The second method came into play in rare cases when an employer telephoned the union dispatcher and requested an apprentice but did not specify a particular individual. If there were no indentured apprentices on the union's hiring list at the time, or if the employer expressly requested a beginning apprentice, the dispatcher asked the local committee to provide him with the name of the top person on the new applicant referral list and that person, if available, was indentured and sent to the union for dispatch. The employer had the right under the collective bargaining agreement to refuse to accept the person dispatched, and his only obligation to the rejected apprentice was to pay for two hours' "show-up time." (CR 217, Exhibit A, pp. 16, 18).

In either event, once a new apprentice was indentured, the apprenticeship committee was no longer involved in the hiring process and the apprentice reported to the union hiring hall for all future job dispatches. The JATC coordinated a program of classroom instruction to supplement on-the-job training given by the employers.

Closing the new applicant referral list at 150 percent of anticipated referrals excluded many people from availability for selection as apprentices and employers objected to limitations on the pool of applicants. Beginning in the fall of 1976, some of the local committees who had met their goals for minority participation obtained approval of the Division of Apprenticeship Standards for an "amended Annex C-1," which was different from Annex C-1 only in that it created an open-end new applicant referral list. Under amended Annex C-1, it was not necessary to register with the local committee before looking for employment, meaning that any applicant finding employment could be indentured. Amended Annex C-1 has since been approved for a majority of local committees.

Linda Eldredge and Christine Mazur registered as applicants for apprenticeship on August 18, 1975, when the closed list procedure of Annex C-1 was still in effect. Linda Eldredge registered with the local committee in San Francisco and Christine Mazur registered in Martinez. Both obtained positions near the top of the new applicant referral list in their respective areas. After orientation meetings where applicants were told about the two alternatives for obtaining employment, both waited to be called from the top of the new applicant referral list. Neither contacted employers directly for almost one year afterward.

Within two weeks after registering with their local committees, Eldredge and Mazur filed charges of discrimination with the Equal Employment Opportunity Commission. On September 30, 1975, the day of the orientation program of the San Francisco committee, Eldredge and Mazur sued under Title VII to enjoin the use of the "hunting license" and for an order requiring referral on a first-come, first-served basis, for an affirmative action plan including goals and timetables for the advancement of women from apprentice to journey status, and for back pay.

On November 3, 1977, the District Court ordered respondents to join as additional parties within 60 days the employer contributors to the apprenticeship trust fund and local unions who dispatched registered apprentices. The District Court held that participating employers were parties in whose absence the action could not proceed under Rule 19(a), Federal Rules of Civil Procedure, because the employers, as the apparent source of discrimination, were situated as a practical matter where they could impair the effectiveness of relief; and because employers had a substantial interest in their freedom to select apprentices which could not be impaired without joining them as parties. See pp. 40-87 of Appendix I. The court also held that the local unions who dispatched apprentices registered with the apprenticeship committee had an interest in the maintenance of an effective apprenticeship training program and were in a position to impose demands upon the JATC which might conflict with any remedy awarded by the court. The court concluded therefore that the local unions were also indispensable parties.

After extensions totaling approximately one year, Eldredge and Mazur filed a motion to amend their complaint in which they named as additional defendants one of the principal contractor associations, the Northern California Home Builders Conference, and the United Brotherhood of Carpenters and Joiners of America. The District Court held that joinder of the association was not a satisfactory substitute for joinder of the individual employers, since a majority of the employers were independents or members of other associations, and because no member had consented to have the association appear on its behalf in the action. See pp. 9-12 of Appendix H. The District Court dismissed the action for failure to comply with the order of November 3, 1977. Appendix G.

The District Court's judgment was reversed by the Ninth Circuit, which said that the "complete relief" with which Rule 19(a)(1) is concerned is only "relief as between persons already parties, not as between a party and the absent person who joinder is sought." Appendix E, p. 8. The Court of Appeals stated that absent employers were not made necessary parties, and consequently could not be indispensable parties, merely because "em-

ployers could defeat any order against JATC by refusing to hire any apprentices, by hiring only unregistered, non-union apprentices, or by rejecting all female apprentices dispatched to them." Appendix E, p. 9.

The JATC subsequently petitioned for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit from the opinion of November 4, 1981. The JATC's petition for writ of certiorari was denied October 12, 1982, Rehnquist, J. dissenting. Appendix D. The matter was subsequently remanded for trial as to liability. Prior to trial the parties filed cross motions for summary judgment. On October 24, 1985, the District Court granted the JATC's motion for summary judgment and denied plaintiff's motion for summary judgment, Appendix C, finding that plaintiff had failed to advance any viable theory upon which the JATC could be held liable for the conduct of employers. A notice of appeal of that decision was filed on November 27, 1985. The District Court's judgment was again reversed by the Ninth Circuit which reversed the District Court's grant of summary judgment to the JATC on the ground that the JATC had the power to select apprentices in any way it deemed appropriate and violated Title VII if it used procedures which unjustifiably discriminated against a class of people protected under Title VII. Appendix A, p. 14. The Ninth Circuit went on to state that plaintiffs had proved a prima facie case of discrimination on the basis of disparity between indenture rates among male and female applicants and that the JATC had not shown a business necessity for the practice alleged to cause this disparity. Appendix A, pp. 26-32. Accordingly, the Court of Appeals held that plaintiffs were entitled to judgment against the JATC on the issue of liability and directed the District Court to enter summary judgment on behalf of plaintiffs, while remanding the case for trial to determine an appropriate remedy. Appendix A, p. 33.

REASON FOR GRANTING THE WRIT

A. The decision below calls for an unwarranted extension of liability under Title VII, an effective remedy to which cannot be fashioned in terms of affording any relief from the alleged discrimination

The ruling of the court of appeals in this matter is incorrect because it rests on the fallacious assumption that evidence of discrimination based on disparate representation of females in the apprenticeship program is due solely to the use of the unrestricted hunting license system. Viewed in an appropriate light, it is clear that the unrestricted hunting license system per se, is irrelevant in terms of any purported discriminatory impact. Furthermore, any conceivable order directing the JATC to adopt an alternate referral system will be ineffectual in that it will necessarily fail to guarantee any effect on the apparent source of the discrimination alleged—the nonparty employers. The Court of Appeals incorrectly assumed that the JATC has full authority to structure its apprenticeship program and to select apprentices in any way it sees fit, since the power of the JATC is clearly limited by the collective bargaining agreements which grant employers the absolute right to accept or reject employees for any reason whatsoever. An order, for example, that the JATC include women in its classroom training programs would be ineffectual in that the essential function of the JATC and its fiduciary responsibility entail administration of a system designed to provide apprentices and journeymen carpenters to the trade. On the job training is a necessary prerequisite for employment as a journeyman carpenter. Accordingly, any order which does not by its terms specifically entail consideration of actual employment would be ineffectual in terms of facilitating the entry of women into the carpentry trade, and would thereby fail to address the root problem asserted by plaintiffs.

The inconsistency of the Court of Appeals decision is made apparent by the court's earlier statement on the one hand, that there is no evidence that "employers would refuse to hire women admitted to the apprenticeship program pursuant to any judgment that may be entered against JATC", 622 F.2d at 537, while on the other hand, being unable to explain how any alleged discrimina-

tion may have occurred in the first place, absent discriminatory conduct on the part of employers. The conclusion is inescapable that the mere use of the unrestricted hunting license system of itself is not discriminatory and that for any discrimination to be proven to exist, the role of carpentry employers must be entered into the equation. If employers did not discriminate in hiring decisions, then there would obviously be no subsequent basis for complaint regarding the use of the hunting license system.

The District Court below recognized that, regardless of any restrictions that might be placed by the Court or the apprenticeship committee on the order or means by which applicants were referred to the union for dispatch to signatory employers, the ultimate decision to grant or deny employment was one which rested exclusively with the individual employer under his collective bargaining agreement. Appendix I, pp. 48, 51-52. If the goal of Title VII was to assure that women had the same access to employment in the carpentry industry as men, then the involvement of the employers who provided training on the job had to be considered. The District Court said in its amended memorandum dated November 8, 1977, "The plain fact is that the opportunity to gradually integrate the trade exists now to the same extent and subject to the same obstacles as it would under any decree that could be fashioned against the JATC alone. There is no evidence that the change in referral system sought here would have any effect on the apparent source of the discrimination alleged—the absent employers." Appendix I, p. 56. The District Court had earlier said, "Although the legal position of the present defendant and its theoretical ability to comply with an order are relevant, they may be outweighed by a finding that parties may as a practical matter prevent the full realization of the intended relief. The Court must guard against the formulation of ' "paper" decrees which neither adjudicate nor, in the end, protect rights.' " Appendix I, p. 47, quoting in part from *Schutten v. Shell Oil Company* (5th Cir. 1970) 421 F.2d 869, 874.

This court, as well as several circuit courts of appeal, has stated that the public has an interest in allocating the finite resources of the judicial system for the "complete, consistent and effective settlement of controversies." *Provident Tradesmans Bank and*

Trust Company v. Patterson (1968) 390 U.S. 102, 111. To proceed otherwise is to risk that the "court would find itself in the position of having made a decree it could not enforce, of attempting to give relief which was beyond its power, because the party whose action was necessary to that relief was not a party of the suit." *Kendig v. Dean*, (1878), 7 Otto (97 U.S.) 423, 425.

This court has said, with regard to discrimination prohibited by Title VII, "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971). To remedy discrimination, "The court has not merely the power but the duty to render a decree which will so far as possible eliminate discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). By contrast, the court has no power to modify terms of employment if the change will not have the effect of remedying unlawful discrimination. *Southbridge Plastics Division v. Local 759* (5th Cir. 1978) 565 F.2d 913, 916; *Stevenson v. International Paper Company* (5th Cir. 1975) 516 F.2d 103, 118.

Responding to the purposes of Title VII, the Court of Appeals for the District of Columbia has refused to issue "rather ineffective symptomatic relief, leaving the root (sexually segregated locals) to continue," in a suit charging sex segregation in two local unions, where the plaintiffs had not joined the parent international union as defendant, and where only the international union could merge, suspend or terminate operation of the two local unions. *Evans v. Sheraton Park Hotel* (D.C.Cir. 1974) 503 F.2d 177. The decision of the Ninth Circuit has left the District Court without the means to compel an end to the alleged discrimination in apprentice hiring, because a first-come, first-served system of referral and dispatch is no barrier as long as employers have the right under the contract to refuse dispatches.

The Ninth Circuit's decision raises the additional question of whether plaintiffs can state a claim against the apprenticeship committee for which relief can be granted under Title VII, when the apprenticeship committee is the only defendant. The District

Court for the Northern District of Illinois has ruled that a law school which makes its placement facilities available to employers is not compelled to investigate their hiring practices or bar those who discriminate from using its placement facilities. *Kaplowitz v. University of Chicago* (N.D.Ill. 1974) 387 F.Supp. 42, 48-49. That decision suggests that the apprenticeship committee has no legal responsibility to police the hiring practices of participating employers. The Northern District of Illinois said that a contrary ruling would substitute whatever investigative and hearing process the school might select for investigation upon a charge filed with the Equal Employment Opportunity Commission under 42 U.S.C. Section 2000(e)-5 and circumvent the jurisdictional requirements under Title VII, imposing an enormous administrative burden upon conventional employment agencies, the like of which was not clearly mandated by the statutory language.

B. The Court of Appeals order directing the district court to enter summary judgment for plaintiff was also unjustified by the Court of Appeals' acceptance of plaintiff's assertion that allowance of a hunting license system resulted in a statistically significant disparity between male and female indenture rates, as sufficient to establish a prima facie case of discrimination

In so finding, the Court of Appeals flatly rejected the JATC's offer of statistical evidence which sought to distinguish indenture rates of female and male applicants as among a group narrower than that statistically represented by the percentage of females as opposed to males in society at large. The Court of Appeals apparently rejected consideration of statistical evidence based on any comparison or consideration of male to female ratios for any purpose unless such comparison was offered relative to the male to female ratio established among the general populace. The Court of Appeals repeatedly relied on an asserted mischaracterization of plaintiff's complaint by the JATC (asserting that plaintiff sought to hold the JATC liable for discrimination solely attributable to employers) in finding that any conclusions as to causes of hiring differentials presented by the JATC's experts "simply have no bearing on the issues in this case." Appendix A, footnote 6 at pg. 20. The Court of Appeals so held notwithstand-

ing agreement as to this characterization of the complaint by two prior District Court opinions, the dissent from denial of certiorari by Justice Rehnquist, and the explicit language of the Ninth Circuit's earlier decision in this matter, Appendix E, at page 5.

The thrust of the Court of Appeals' rejection would appear to be based on its assumption that any statistically significant disparity in indenture rates of women as compared to men in this program could only be based on a determination grounded in a comparison of the rate of representation of males and females in general.

The Seventh Circuit has recently addressed the issue of Title VII prima facie evidentiary proof of disparity in terms of adequacy based on statistical comparisons in a case where a municipality sought to substantiate its affirmative action programs for its police and fire departments solely on the ground that a statistical disparity existed between the percentage of minorities in the city's overall population as compared to the percentage of minorities in the aforementioned departments. *Janowiak v. City of Southbend* ____ F.2d ____, 45 F.E.P. Cases 973 (7th Cir.1987), Rem. ____ U.S. ____, ____ S.Ct. ____, 43 F.E.P. Cases 640. In this case the Court of Appeals for the Seventh Circuit was directed on remand to reconsider its earlier ruling in light of related Supreme Court decisions which were potentially relevant. On remand, the Seventh Circuit upheld its earlier ruling, holding that

> "Any proffered statistical comparison must establish a manifest imbalance between the relevant qualified area labor pool and the employer's work force". 45 F.E.P. at 977.

The Seventh Circuit went on to say that,

> "If a job category requires that applicants possess minimum qualifications, the city's proffered statistical comparison must narrow its focus to those actually qualified for the position. Because the city here did not offer any evidence of statistical disparity between the number of minorities in the fire department and the number of qualified minorities in the area labor pool, it failed to establish the manifest imbalance required by *Johnson*." Id. citing *Johnson v. Transportation Agency*, 480 U.S. ____, 107 S.Ct. 1442, 43 F.E.P. Cases 411 (1987)

As applied to the instant matter, the clear import of the Seventh Circuit's post remand decision in *Janowiak* is that any alleged Title VII violation officially submitted on evidence of disparate representation cannot survive absent submission of evidence of legally sufficient disparity between admission rates or first job hiring rates of qualified area female labor pool representatives, as compared to qualified area male labor pool representatives. In *Janowiak,* as in this case, the general statistical comparison which was initially relied upon was insufficient because it was based on general population statistics instead of focusing on the relevant qualified area labor pool.

The Ninth Circuit's decision also raises a question of fairness and due process by allowing plaintiffs to make the apprenticeship committee a surrogate defendant to answer for the hiring policies of the 4800 employers of construction carpenters in Northern California. If plaintiffs are found to have made out a prima facie case on statistics alone, the JATC may be put to the burden of establishing legitimate reasons why plaintiffs were not employed, based upon facts which are within the exclusive control of plaintiffs and the respective employers. See *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977). There may be many facts in individual cases which would justify low representation among women in the apprenticeship program in various areas, of which some examples are: The employer had no women applicants under the "hunting license" system; the employer had no work for beginning apprentices; the employer had fewer than five journeymen and was not required to hire apprentices; the employer's business was located in one of several geographical areas where there were no women applicants; because of heavy lifting or height requirements of the job, qualified women were not available; or the employer did hire women apprentices without discrimination as openings and applicants were available. Standards for selection of employees used by 4800 contractors working in various subdivisions in the carpentry trade covered by the apprenticeship program, from two or three carpenter roofing businesses to residential developers hiring hundreds of framing contractors, would inevitably be so complex and diverse, according to difficulty and nature of work and available labor

pools, that we cannot conceive that the JATC would have the resources to assemble the evidence.

The Ninth Circuit's decision also leaves open the possibility that women applicants who are not hired by employers to whom they are referred and dispatched will be required to file separate lawsuits under Title VII, and the courts will be required to retry many of the same issues on an individualized basis, because parties not joined in this proceeding will not be estopped by any judgment rendered here. The expenditure of judicial resources in pursuing this action solely against the JATC, or in rendering an order applicable only to the JATC, cannot be justified by the benefits to be obtained under Title VII.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: April 27, 1988

Respectfully submitted,
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(Appendices follow)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 85-2846
D.C. No. C-75-2062-JFV

LINDA ELDREDGE, on behalf of herself and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendants-Appellee.

OPINION

Appeal from the United States District Court for the Northern District of California
John P. Vukasin, District Judge, Presiding.

Argued and Submitted: June 9, 1987 - San Francisco, California

Filed: December 9, 1987

Before: Betty B. Fletcher, Stephen Reinhardt and Alex Kozinski, Circuit Judges

Opinion by Judge Fletcher

OPINION

FLETCHER, Circuit Judge:

Eldredge filed a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e-2, alleging that the procedures used by the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee (JATC) to admit applicants into its apprenticeship program have an impermissible adverse impact on women. On cross-motions for summary judgment, the district court entered judgment in favor of the JATC because it found that Eldredge was attempting to hold the JATC liable for the discriminatory acts of third parties, rather than for its own conduct. Eldredge appeals from the grant of the JATC's motion and the implicit denial of her own motion for summary judgment. We reverse and remand.

BACKGROUND

The JATC is a joint labor-management committee, established pursuant to a trust agreement, that administers the carpentry apprenticeship program in Northern California. As we previously noted, "[t]he trust fund agreement grants full authority to JATC to structure the apprenticeship program and to select the apprentices." Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm., 662 F.2d 534, 538 (9th Cir. 1981), cert. denied, 459 U.S. 917 (1982)(Eldredge II). To be admitted into the apprenticeship program, an applicant must (1) be at least seventeen years old; (2) have a high school diploma or G.E.D. equivalent; (3) have his or her name placed on a "new applicant referral list"; and (4) satisfy a first-job requirement by obtaining employment with

a union contractor. Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm., 440 F.Supp. 506, 511 (N.D. Cal. 1977), rev'd, 662 F.2d 534 (9th Cir. 1982)(Eldredge I).

It is the implementation of the first-job requirement that is at issue in this case. There are two ways in which applicants may obtain their first jobs. First, if a contractor requests the union to provide a beginning apprentice and does not name a particular individual, applicants are dispatched in numerical order from the new applicant referral list. Very few applicants obtain work through the referral system; indeed, it is nearly futile for an applicant to depend on this method. Eldredge I, 440 F.Supp. at 512. Second, an applicant may find an employer willing to provide her with a job and to request her by name.

This method, which is known as the "hunting license" system, is the one through which the vast majority of indentured apprentices obtain their first jobs and gain admittance into the apprenticeship program. For the years 1976 through 1984, 20.9% of female applicants and 38.8% of male applicants became indentured apprentices. The female admission rate was thus about 54% of the male admission rate.

In 1977, Linda Eldredge, on behalf of all unsuccessful female apprenticeship applicants, filed an amended complaint alleging that the JATC's use of the "hunting license" system has a disparate impact on women applicants and as such violates section 703(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e-(2)(d).[1] In 1979, the district court dismissed the case under Federal Rule of Civil Procedure 19 for failure to join the 4,500 potential employers of apprentices. Eldredge I, 440 F.Supp. at 519-24. This court reversed, holding that the employers were not necessary parties under Rule 19(a) and thus could not be indispensable parties under Rule 19(b). Eldredge II, 662 F.2d at 536-38. On remand, the plaintiff class was certified, and both sides moved for summary judgment. The district court,

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[1] 42 U.S.C. § 2000e-2(d) provides:

It shall be unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

finding the JATC to be the equivalent of an employment agency for the purpose of Title VII and finding the focus of Eldredge's complaint to be discrimination by employers rather than by the JATC, granted the JATC's motion. The court concluded that "[a]s plaintiff has established no basis on which to hold the JATC liable under Title VII for the alleged unlawful conduct of these employers, defendant's motion for summary judgment must be granted." Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., No. C75-2062-JPV at 5 (N.D. Cal. Oct. 24, 1985)(order)(Eldredge III). Eldredge timely filed notice of appeal from the district court's order.

STANDARD OF REVIEW

Both the grant of summary judgment to the JATC and the denial of Eldredge's

summary judgment motion are reviewed de novo. Idaho v. Hodel, 814 F.2d 1288, 1292 (9th Cir.), cert. denied, __ S.Ct. __ (1987). "Viewing all the evidence in the record in the light most favorable to the non-moving party, we must determine whether there is a genuine issue as to any material fact and, if not, whether the substantive law was correctly applied." Id.; Fed. R. Civ. P. 56(c). The entry of summary judgment is mandatory

> after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be

> "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v Catrett, 106 S. Ct. 2548, 2552-53 (1986).

DISCUSSION

The JATC's Motion for Summary Judgment

[1] To assess the propriety of the district court's grant of summary

judgment to the JATC, we must determine whether the court correctly found that the JATC could not be in violation of Title VII because it did not make the allegedly discriminatory hiring decisions. To establish a prima facie case of discrimination in a disparate impact case, "a plaintiff need only show that the facially neutral standards in question select applicants for hire [or, in this case, for admission to an apprenticeship program] in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). The JATC's requirement that applicants secure employment, which is implemented primarily through the "hunting license" system, is a "facially neutral standard" used to determine who will be admitted into

the apprenticeship program. If the requirement as implemented has a significantly discriminatory impact on women applicants, Eldredge clearly has the basis for a claim under Title VII.

[2] The district court held, in effect, that use of a facially neutral requirement is permissible even though it is discriminatory so long as it is a third party that is doing the discriminating. The district court reached this result by recharacterizing Eldredge's complaint as an attempt to hold the JATC liable for the discriminatory hiring practices of employers in the construction industry. In fact, Eldredge claims that the JATC is liable for its <u>own</u> implementation of the first-job requirement in a

fashion that adversely affects women.[2] All that a disparate impact plaintiff must show, in the first instance, is the existence of a practice that serves to exclude a protected class in disproportionate numbers. The JATC does not content that some factor other than the "hunting license" system accounts for women'slower admission rate into its program.[3] It cannot avoid liability for the effects of its own

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[2]That the employers' practices may be discriminatory lends support to the plaintiffs' claim that the "hunting license" method of meeting the first-job requirement is discriminatory.

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[3]The JATC's experts did attempt to show that factors other than gender discrimination by employers accounted for the fact that fewer women than men succeeded at securing employment. See infra note 6.

admission procedures by pointing to the discriminatory practices of those to whom it has delegated the power to select apprentices.

[3] The district court relied on Kaplowitz v. University of Chicago, 387 F.Supp. 42 (N.D. Ill. 1974), which held that a law school was not required to police the discriminatory practices of employers who used its placement facilities. The Kaplowitz court found that the law school was an employment agency for the purposes of Title VII, id at 46; see 42 U.S.C. § 2000e-2(b) (unlawful employment agency practices), but agreed with an EEOC opinion letter stating that the only obligation of an employment agency is to refer potential employees in a nondiscriminatory

manner.[4] The JATC, however, does not stand in the same position as an employment agency. It is not simply an intermediary between applicant and

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[4]The Kaplowitz court's holding was based primarily on its finding that the relief sought, which would have required the law school to determine whether particular law firms were guilty of discrimination, would bypass the Title VII statutory procedures. The court reasoned that in the course of reviewing a grant of injunctive relief to the plaintiffs it

> would eventually have to make a determination as to whether a prospective employer was in violation of Title VII, for only then would the Law School, as an operator of an employment agency, be in violation of Title VII....But it is equally clear that courts shall not hear Title VII suits before they are heard by the EEOC. This procedure would frustrate the conciliation efforts the statute is designed to initiate.

387 F.Supp. at 49. In this case, the JATC would not be required to determine whether the employers discriminate and no court will ever be asked to hold that the employers violate Title VII in the absence of prior EEOC consideration of the allegation. This is (continued)

employer. Rather, it is the JATC that possesses the full authority to select the carpentry apprentices for Northern California. Eldredge II, 662 F.2d at 538. The district court failed to recognize that the employers are merely delegates of the JATC's power to determine which applicants will be admitted into the program. Because the JATC may, under the trust agreement, select apprentices in any way it deems appropriate, it violates Title VII if it uses procedures that unjustifiably discriminate against a class of people protected under Title VII.

In holding that the JATC could not be liable for the discriminatory effects of the "hunting license" system, the

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because, as discussed above, the issue is the impact of the "hunting license" system and whether it is a business necessity.

district court incorrectly applied the substantive law. Accordingly, we reverse the district court's grant of summary judgment to the JATC.

Eldredge's Motion for Summary Judgment

We now turn to Eldredge's claim that the district court erred in not granting her cross-motion for summary judgment on the issue of liability.

At the outset, in a disparate impact case under Title VII, the plaintiff must make out a prima facie case. She carries the burden of demonstrating that the challenged employment practices produce a significantly discriminatory selection pattern. Dothard, 433 U.S. at 329; Atonio v. Wards Cove Packing Co., 827 F.2d 439, 442 (9th Cir. 1987). A showing of discriminatory intent is not required in a disparate impact case, International Bhd. of Teamsters v. United States, 431

U.S. 324, 349 (1977); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303 (9th Cir. 1982), cert. denied, 467 U.S. 1251 (1984), and the Title VII plaintiff "need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence." Bazemore v. Friday, 106 S.Ct. 3000, 3009 (1986). An uncontroverted showing of significant statistical disparities may be sufficient to establish the plaintiff's prima facie case. New York Transit Auth. v. Beazer, 440 U.S. 578, 584 (1979); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

If the plaintiff establishes a prima facie case of discriminatory impact, the burden then shifts to the defendant to

refute the statistical data to show that no disparity exists or to prove that its practice is a business necessity. Atonio, 827 F.2d at 442.[5] An employer may demonstrate business necessity by proving that its selection criteria are essential to insure job safety or efficiency or are correlated with success on the job. "Job relatedness is a means of proving 'business necessity' when the purpose of a criterion is to predict the capacity of particular individuals to perform a job successfully." Id. "[T]he employer must demonstrate the 'manifest relationship' between the challenged practice and job performance." Id. (quoting Griggs v. Duke Power Co., 401 U.S. at 424, 432

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[5]The shift of the burden of persuasion to the defendant distinguishes disparate impact cases from disparate treatment cases, in which the burden at all times remains on the plaintiff. See Atonio v. Wards Cove Packing Co., 827 F.2d 439, 442 (9th Cir. 1987).

(1971)). "Precisely what the employer must prove will vary with the unique factors of different job settings, but '[t]he touchstone is business necessity.'" Id. (quoting Griggs, 401 U.S. at 431). If the defendant carries its burden, the plaintiff may yet prevail by proving the availability of an effective non-discriminatory alternative. Contreras, 656 F.2d at 1275. In short, Eldredge is entitled to summary judgment on the issue of JATC's liability if there are no disputed facts as to the material issues: (1) whether the "hunting license" system causes significant statistical disparities between the percentage of female applicants and the percentage of male applicants admitted into the apprenticeship program; (2) whether use of the "hunting license" system is a business necessity; and (3)

if it is a business necessity, whether non-discriminatory alternatives exist.

To the extent that women and men are admitted into the apprenticeship program at different rates, it is not contested that the differential results from use of the "hunting license" system and not from some other element of the admission process. The JATC attempts to explain why the "hunting license" system has this effect but does not dispute the existence of the effect.[6]

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[6]The JATC's experts conducted a survey of people in the carpentry trade, comparing men and women, to determine whether the difference in indenture rates resulted from discrimination. The decision to study the group of people who were successful at breaking into the trade is very odd given that the group at issue in this lawsuit consists of those who were excluded. For example, the fact that among those employed "86%" of males and 88% of females found their first job within three months" is immaterial if a far greater percentage of women than men never found a job. (continued)

[4] The data on admission rates for qualified men and women into the

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Furthermore, the JATC's experts apparently were directed to conduct their survey in conformity with the JATC's theory of the case, according to which Eldredge was attempting to hold the JATC liable for discrimination by employers. The JATC's study was directed at proving that contractors do not discriminate against women in their hiring practices. The experts thought it significant that more men took shop classes in high school and were referred to their first job by a friend or family member. It simply does not matter, however, why requiring applicants to find their own first job selects men at a disproportionate rate - unless the reason is also a job-related requirement. In this case, neither prior training nor a journeyman relative are required. Indeed, if, for example, the JATC did require apprentice applicants to have taken high school shop classes, and if substantially fewer women than men satisfied this condition, the requirement would violate Title VII unless the requirement distinguished those who are competent to become carpenters from those who are not.

Because the JATC mischaracterized Eldredge's complaint, its experts' conclusions as to the causes of hiring differentials, even forgiving the obvious error of excluding the necessary population from the study, simply have no bearing on the issues in this case.

apprenticeship program, which were supplied by the JATC, demonstrate a substantial disparity between the sexes. Aggregated over a nine-year period, women's admission rate as a percentage of women applicants was approximately fifty-four percent of men's admission rate. In absolute numbers over a nine year period 21,066 men but only 657 women were indentured.[7] The guidelines established

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[7]The data for 1976 through 1984 are as follows:

Applicants	Indentures
Number of Men: 54,344	Number of Men (%): 21,066 (38.8)
Number of Women: 3,140	Number of Women (%): 657 (20.9)

Analyzed year-by-year, assuming that applicants from prior years remain in the applicant pool, the data shows that women's indenture rate fluctuated between 16.09% and 64.03% of the men's rate. If it is assumed that there was no carryover of applicants from prior years, in seven of the years, women were indentured at between 17.21% and 73.34% of (continued)

the male rate; in one year, the rate was 85.46% and in another 147.27%. The parties dispute whether a year-by-year analysis is necessary in this case. Although Eldredge did such an analysis, and the results demonstrated a substantial discriminatory impact for all years if a carryover is assumed and for seven of nine years with no carryover, she argues that the aggregated data alone may be relied on to prove her case. We agree. The aggregated data presents a more complete and reliable picture of the effects of the JATC's admission practices. See Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 336 n.17 (4th Cir. 1983), cert. denied, 466 U.S. 951 (1984). Of course, if a year-by-year analysis demonstrated an ever-decreasing discriminatory impact, such a result should not be ignored. In this case, however, women did less well relative to men in the last two years for which data is available than they did over the nine year period as aggregated. Where, as here, "policies have remained unchanged over a period of time and there have been no substantial changes in the conditions determining their application, it would be unreasonable to require a plaintiff to break his or her data into year by year subgroups." D. Baldus & J. Cole, Statistical Proof of Discrimination § 7.1 (1986 Supp.). Accordingly, we find that the aggregated data are the most probative and are certainly sufficient in this case.

established by the Equal Employment Opportunity Commission provide that "a selection rate that 'is less than [80 percent] of the rate for the group with the highest rate will generally be regarded...as evidence of adverse impact.'" Connecticut v. Teal, 457 U.S. 440, 443 n.4 (1982)(quoting 29 C.F.R. § 1607.4D (1981)); see also Abermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (stating the EEOC guidelines, as interpretations of Title VII by the enforcing agency, are entitled to "great deference"), Thomas v. Metroflight, Inc., 814 F.2d 1506, 1511 n.4 (10th Cir. 1987) (using the EEOC's 80% rule as an index of "substantial disparity").

[5] Both Eldredge and the JATC employed statisticians to evaluate the "significance" of the male/female differential; that is, to test the

probability that the disparity resulted from chance rather than from the challenged admission procedures. Although the statisticians disagreed as to how the data should be broken down and employed different statistical models in their analysis, both found that the disparity was statistically significant.[8] Because

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[8]Eldredge's statistician, Dr. Kakigi, using a binomial model, found that for the data aggregated over nine years, there was less than once chance in ten to the eighty-third power that the disparity in indenture rates resulted from chance (12.49 standard deviations). This astronomical result, however, may be inaccurate. The overall indenture rate was .38, and use of a binomial model "when the overall selection rate is too large, e.g., more than .20, can lead to results which are substantially misleading and inaccurate." D. Baldus & J. Cole, supra note 7, § 9.0 (1986 Supp.).

The JATC's statistician, Dr. Thomas, found that there was one chance in fifty (0.2) that the disparity resulted from chance using a matched T test and once chance in twenty-two (0.45) using a sign test. These results are probably too conservative. Based on Dr. Thomas's declaration, it is clear that (continued)

he did not evaluate the data as aggregated over the nine years at issue. We have determined that the aggregated date is the most probative in this case. See supra note 7.

Furthermore, it appears that Dr. Thomas's model rejected the assumption that male and female applicants had the same probability of becoming indentured. Dr. Thomas thought it significant that, among people within the carpentry trade, more men than women were referred to their first job by a friend or family member, and that, in high school, women were less interested in carpentry than were men. It would seem that Dr. Thomas's analysis was designed to test whether factors other than gender discrimination on the part of employers accounted for women being less successful at obtaining jobs. For the purposes of Eldredge's prima facie case, however, the issue is not why the "hunting license" system has a discriminatory impact, rather the issue is simply whether it has such an impact. To the extent that Dr. Thomas injected considerations other than the disparity in indenture rates into his model and analysis, his results would underestimate the level of statistical significance. The fact that Dr. Thomas used a matching test indicates that he broke the data down into subgroups in order to control for variables. See D. Baldus & J. Cole, supra note 7, § 7.0-7.2 (1980 & 1986 Supp.). In general, "the plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies." Id. § 7.1 (1986 Supp.). Here, (continued)

Eldredge demonstrated that use of the "hunting license" system resulted in a substantial and statistically significant disparity between male and female indenture rates, she established per prima facie case of discrimination.

[6] The burden shifted to the JATC to prove that the "hunting license" system is a business necessity. To establish

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there simply are no subgroups. All applicants, male and female, meet the age and education requirements for admission into the program and should thus be presumed to have an equal chance to be indentured.

It thus appears that neither statistician accurately tested the level of statistical significance - Dr. Kakigi's figures are too high and Dr. Thomas's are too low. However, even Dr. Thomas's lowest figure, once chance in twenty-two (.045) is sufficient to give rise to an inference that the "hunting license" system rather than chance is responsible for women's lower indenture rates. See Segar v. Smith, 738 F.2d 1249, 1283 (D.C. Cir. 1984)(holding that the .05 level of significance is "certainly sufficient to support an inference of discrimination"), cert. denied, 471 U.S. 1115 (1985).

business necessity, the JATC claims that their system is both job-related and necessary to the efficient operation of the apprenticeship program.

[7] Even if we assume that requiring apprentices to have a job in the industry is a business necessity (because the classroom training is more effective when combined with hands-on experience),[9] theJATC has neither argued nor produced evidence that use of the "hunting license" system to satisfy the first-job requirement is itself a business necessity. Indeed, such would be the case only if one's ability to find a job were an accurate measure of one's ability to learn the carpentry trade. See Contreras,

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[9]Eldredge argues that the JATC's practice of permitting indentured apprentices to remain in the program if they become unemployed belies the claim that the first-job requirement is a business necessity.

656 F.2d at 1271 (To be job-related, a screening device must "actually measure [] skills, knowledge, or ability required for successful performance of the job."). Obviously it is not. Nor has the JATC argued that the "hunting license" system is the only way in which the first job requirement can be satisfied. Such an argument would be futile given that an alternate method - numerical referral from the new applicant referral list - is already in place.[10] See supra at __.

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[10]While ordinarily we would require plaintiffs to show that the alternate method would be both effective and nondiscriminatory, we do not think that such proof is essential here. The alternate method is an established procedure set forth in the collective bargaining agreement. Since plaintiffs, the injured parties, are willing to accept the contractually established alternate method, we think it fair to presume that it will be utilized in an effective and nondiscriminatory manner.

As we previously held in this case:
JATC may not avoid its (continued)

Furthermore, requiring apprentice applicants to find their own jobs or allowing employers to select their own apprentices is at odds with the hiring-hall system that, under the Carpenters Master Agreement, employers must use to fill most of their non-apprentice hiring needs. Thus, the JATC has demonstrated business necessity with

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> own liability for practices illegal under Title VII by relying on the employers' possible future conduct that might frustrate the remedial purpose of any court-ordered changes in the apprenticeship program....
>
> ...There is no evidence [that the employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC in this suit.] On the contrary, the employers have previously participated, apparently successfully, in a state-mandated affirmative action program designed to increase the number of minority apprentices.

Eldredge v. 46 N. Cal. Counties Joint Apprenticeship and Training Committee, 662 F.2d 534, 537 (9th Cir. 1981).

a showing of apprenticeship-relatedness in the sense of showing that it is essential to hire apprentices in a different manner than journeymen are hired.

In support of its "business necessity" defense, the JATC also submitted the declaration of JATC officer Gordon Littman. Littman convincingly explained why the JATC cannot and should not accept all those who apply into the apprenticeship program - it lacks the resources to train them and there are not sufficient apprenticeship positions in the industry to accommodate all applicants. The district court found, based on Littman's declaration, that the "first job" requirement was based on a "legitimate business reason." Eldredge III, No. C75-0262-J.P.V. at 4. Apart from the fact that a "legitimate business

reason" is not the same thing as a "business necessity,"[11] the district court (and Littman) failed to recognize that Eldredge is not seeking to have all applicants accepted into the program and that alternatives to the "hunting license" system are equally capable of appropriately limiting the number of indentured apprentices.[12] In short,

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[11]See Atonio, 827 F.2d at 442 ("Business necessity means more than a business purpose.")

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[12]Eldredge suggests that the first-job requirement could be eliminated, and qualified applicants indentured on a first-come-first served basis. Indentured apprentices are eligible for job referrals through the union hiring hall. If the first-job requirement were retained, Eldredge suggested that the alternative method of numerical referrals from the new applicant referral list would serve the purpose of limiting the number of admittees and at the same time cure the discriminatory impact of the "hunting license" system.

the JATC produced no evidence that the "hunting license" system is a business necessity that must be employed to limit the number of carpentry apprentices.

Because a showing that the "hunting license" system is a business necessityis an essential element of the JATC's case on which it would bear the burden of proof at trial, the JATC's failure to adduce proof on this issue entitled Eldredge to judgment against the JATC on the issue of liability - the JATC is violating Title VII as a matter of law, Celotex, 106 S. Ct. at 2553; cf. Martinez v. United States, 669 F.2d 568, 570 (9th Cir. 1981)("Under proper circumstances, an appellate court may order the district court to enter summary judgment for the nonmoving party.")

CONCLUSION

The district court's grant of summary judgment to the JATC is REVERSED. The case is REMANDED for entry of summary judgment for the plaintiff class on the issue of Title VII liability based on the JATC's use of the "hunting license" system and for trial to determine the appropriate remedy.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 85-2846
D.C. No. C75 2062 JPV

LINDA ELDREDGE, on behalf of herself and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendants-Appellees.

ORDER

Before: Fletcher, Reinhardt, and Kozinski, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C75-2062-J.P.V.

LINDA ELDREDGE, on behalf of herself, and on behalf of all women similarly situated,

Plaintiff,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant.

ORDER

Plaintiff Linda Eldredge brought suit under Title VII, 42 U.S.C. Section 2000e-2, against the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee (JATC), alleging sex discrimination in the operation of the JATC's apprenticeship program. The matter was subsequently certified as a class action.

This matter is now before the court on cross motions for summary judgment. For the reasons set forth below, the JATC's motion for summary_judgment will be granted.

Defendant JATC is a joint labor-management committee responsible for establishing, supporting, and maintaining programs to educate and train journeymen carpenters and apprentices. The principal function of the JATC is to develop, coordinate, and administer a

program of classroom instruction to supplement training given by employers on the job. The JATC does not restrict the hiring of apprentices or limit the number of persons eligible for training. Essentially a school for the unionized trade, the JATC will offer training to anyone meeting the minimal criteria of being 17 years of age and having a high school diploma or equivalent, if that person has an offer of employment as an apprentice carpenter by a signatory employer, which plaintiff calls the "first job" requirement. The age and education requirements are not at issue in this case.

No evidence has been presented of direct discrimination on the part of the JATC. Instead, plaintiff, a woman applicant, alleges that the "first job" requirement has an adverse impact on

women because she claims that employers are less willing to hire women as carpenters. Plaintiff contends that the JATC should be required to develop a different admission standard that minimizes the opportunity for employers to select those who gain entry to the JATC program. No evidence of discrimination on the part of any particular employer has been presented, though plaintiff indicated that she intended to present evidence at trial of statistical differences between the hiring of men and women applicant carpentry apprentices by signatory employers.

Plaintiff, however, fails to advance any viable theory upon which the JATC may be held liable for the conduct of the employers. The fact that the JATC is funded by the activities of the employers

and that the employers appoint one-half of the trustees is insufficient to establish either a principal-agent or master servant relationship, either of which, if in existence, could make the JATC liable for employer conduct. General Building Contractors Association vs. Pennsylvania 458 U.S. 375 (1982).

Plaintiff has also failed to state any grounds by which the JATC would have an affirmative obligation to investigate or prevent employers from discriminating against women. Title VII Section 2000e-2 (d) does not impose a general police responsibility upon an apprenticeship committee with regard to the hiring practices of employers who contribute to the program. This is precisely what plaintiff's complaint attempts to do. In this respect, the instant case is similar

Kaplowitz vs. University of Chicago (N.D. Ill. 1974) 387 F. Supp. 42. In Kaplowitz the court held that a law school had no affirmative duty to investigate the hiring practices of employers using its placement office or to bar their use to employers who allegedly discriminated against women. Plaintiff has presented no authority, and the court has found none, to support that the JATC, any more than the law school in Kaplowitz, insert itself into the hiring practices of the employers whose employees seek training as apprentices.

Plaintiff, relying on a previous decision of the Ninth Circuit Court of Appeals in this case, states that the JATC has the power under its trust agreement to structure its apprenticeship program in any way it sees fit. Plaintiff, however, fails to show how the

JATC has a responsibility to change the program because of the conduct of others. A May 4, 1966 opinion letter of the General Counsel for the EEOC, quoted in Kaplowitz, expressed a similar conclusion in connection with employment agencies:

> "An employment agency is not required to consider whether there is discrimination in the compensation, terms, conditions, or privileges of employment offered by an employer to his employees. Once the employment agency has lawfully referred the prospective employee for employment, the employment agency has discharged its legal duty under Title VII." EEOC, First Annual Digest of Legal Interpretations 8.

The court sees no reason why a different standard should apply here. Plaintiff states that a solution to the alleged discrimination would be to eliminate the requirement that an applicant secure a job in order to gain admission to defendant's program. The impact of plaintiff's suggestion would be that any applicant to the program would

be eligible for training by the JATC. Since the beginning of 1976, 57,484 people have applied to the program. Of these, 21,723 or slightly more than 1 out of 3 obtained a job and became eligible for the JATC's classroom training. The JATC has stated in a declaration, and plaintiff has not denied, that to attempt to train all applicants, whether working or not, would strain the program's and resources, space, and time and result in less training for each. This is a legitimate business reason for retaining the "first job" requirement.

The focus of plaintiff's complaint is discrimination by employers. As plaintiff has established no basis on which to hold the JATC liable under Title VII for the alleged unlawful conduct of these employers, defendant's motion for summary judgment must be granted.

Defendant JATC's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied. The action is dismissed with prejudice, with costs to defendant. The clerk is directed to enter judgment in accord with this Order.

Dated: 10/24/85

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Judge of the United States
District Court

APPENDIX D

SUPREME COURT OF THE UNITED STATES

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRAINING BOARD

V.

LINDA ELDREDGE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-2927.

Decided October 12, 1982

The motion of respondents for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is denied.

JUSTICE REHNQUIST, dissenting from denial of certiorari.

This case raises a question of the proper application of Rule 19 of the Federal Rules of Civil Procedure[1]. Because I believe the Court of Appeals seriously misapprehended the import of

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[1]Rule 19(a) provides in pertinent part:

A person...shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring...inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

the rule, I respectfully dissent.

Petitioner Joint Apprenticeship Training Committee ("JATC") is the board of trustees for the Carpenters Apprenticeship and Training Trust Fund for Northern California. The labor-management agreement that created JATC required it to establish and maintain programs for training apprentices. Respondents, two women who sought unsuccessfully to become carpentry apprentices, sued JATC in the District Court, claiming its selection process discriminates against women in violation of Title VII, 42 U.S.C. § 2000e-2. The District Court set out the facts in detail in its first opinion, 440 F.Supp. 506, 510-14 (ND Calif. 1977).

JATC's program provides 4 years of classroom instruction for apprentices, who receive on-the-job training from an

employer. In theory, applicants can become indentured apprentices in one of two ways. First, they can wait in line at a local JATC office to obtain a place on a referral list. Employers can call the local office, which will refer to them the applicant at the top of the list. Employers are entitled under their collective bargaining agreements to reject referred applicants "for any reason." If the employer hires the referred applicant, he or she is indentured and thus admitted to the training program.

Second, local JATC offices will give anyone a "hunting license," which enables the holder to hunt for jobs directly from employers. If the applicant obtains a job, he or she is indentured without regard to the referral list. In practice, very few employers use the

referral list and virtually all apprentices obtain their jobs through a hunting license.

As the Court of Appeals found, the essence of respondents' amended complaint is that JATC adopted the hunting license system knowing it has a discriminatory effect on women. Respondents claim that employers discriminate against women when hiring applicants with hunting licenses, and the JATC's use of the system therefore violates Title VII. 662 F. 2d 534, 536 (CA9 1981). Respondents sought injunctive relief requiring JATC to adopt some other system. As the District Court noted:

> [Respondents] have not specified the precise system they seek to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a

> beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of non-discriminatory techniques.

44 F.Supp., at 514 (footnote omitted).

The District Court held the employers are necessary parties under Rule 19(a)(1). It reasoned that any relief it might grant against JATC alone would be ineffective. Although more women might obtain referrals, they would not be any more successful in becoming apprentices. "There is no evidence that any change in the referral system sought here will have any effect on the apparent source of the discrimination alleged - the absent

employers."[2] 440 F. Supp. at 521.

Furthermore, the District Court reasoned, employers have a substantial interest in selecting their own apprentices. Even if the court could affect employers' hiring decisions by a decree entered only against petr, it would be unfair to do so without affording them an opportunity to contest the allegations. Thus the employers are also necessary

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[2]The District Court acknowledged that it could order JATC to include women in its classroom programs, but noted that such an order would not help any women obtain the on-the-job training that is a prerequisite for employment as a journeyman carpenter. "Thus the relief obtained in this lawsuit would serve only to swell the ranks of unemployed apprentices. This surely cannot be the 'complete relief' contemplated by Rule 19(a)." 440 F. Supp., at 520

See generally Gilmore v. Kansas City Terminal Ry., 509 F. 2d 48, 52053 (CA8 1975); Evans v. Sheraton Park Hotel, 508 F. 2d 177, 181 (CADC 1974).

parties under Rule 19(a)(2)(i)[3]. 440 F.Supp. at 522-23.

The District Court applied the balancing process established by Rule 19(b)[4] and concluded that the employers

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[3]The District Court found the employers' interests were not sufficiently similar to JATC's interests for a decree against JATC to bind the employers as non-party participants under Rule 65(d). this ruling was apparently not challenged on appeal.

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[4]Rule 19(b) provides:

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgement by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (continued)

are indispensible parties. Respondents were unable to join the 4500 employers, so the District Court dismissed the action without prejudice under Rule 41 (b). 83 F.R.D. 136 (ND Calif. 1979).

The Court of Appeals reversed. 662 F. 2d, at 537-38. Although the Court of Appeals claimed "the district court misapprehended the legal inquiry required by rule 19(a)(1)," it did not state what form of inquiry would be appropriate. It believed the court has "both the power and the duty to enjoin" activities that violate Title VII. "[R]elief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone." 622 F. 2d, at 537.

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third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

This seems to mean that since plaintiffs have sought only an injunction against JATC, the District Court can afford the complete relief contemplated by Rule 19 (a)(1) by granting only what the plaintiffs seek, regardless whether the order would have any impact on the discrimination that was apparently the reason for the lawsuit. This approach ishardly the "pragmatic" reasoning this Court commended in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U. S. 102, 106-107, 116-17, n. 12 (1968).

Although the Court of Appeals thought there was "no evidence" that "employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC," 662 F. 2d, at 537, the substance of respondents' complaint is that employers discriminate against women.

See 83 F.R.D., at 138. The District Court correctly perceived the dilemma it and respondents faced. If it ordered relief against JATC alone, it could not affect the alleged discriminatory practices. Rule 19(a)(1). If it ordered relief against the employers, it would almost certainly affect their right to select apprentices without affording them an opportunity to rebut the charge that they discriminate. Rule 19(a)(2)(i)[5].

The Court of Appeals sought to avoid the force of this argument by claiming that because the agreement that created JATC grants it "full authority to structure the apprenticeship program and to select the apprentices ... the

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[5]See NLRB v. Doug Neal Management Co., 620 F. 2d 1133, 1139-40 (CA6 1980) (adopting the approach of and quoting extensively from the opinion of the District Court in this case).

employers have by contract ceded to JATC whatever legally protectible interest they may have had in selecting apprentices to be trained." 662 F. 2d, at 538. This is simply not correct. The agreement gives JATC authority only to select persons to refer to employers; an applicant does not become an apprentice and begin the training program until and unless an employer hires him. 440 F. Supp., at 510-512, 83 F.R.D., at 137. And, as noted above, employers have bargained to retain their right to reject any applicant for any reason. Yet the Court of Appeals rather cavalierly found, in a proceeding to which the employers were not parties, that the employers have ceded these rights.

The impropriety of the Court of Appeals's ruling is demonstrated by General Building Contractors Association,

Inc. v. Pennsylvania, ___ U. S. ___, 50 U. S. L. W. 4975 (June 29 1982), in which we considered a similar apprenticeship system. We held that a district court cannot issue an injunction against employers in an employment discrimination case under 42 U. S. C. § 1981 when the employers are not guilty of intentional discrimination. In that case there apparently was no hunting license system, and the discrimination was caused by the JATC and the union, but the bar to an injunction was the same as the bar that will face the District Court on remand in this case: it is improper for a court to act against a person who has not been found to have violated the law.

The Court of Appeals, as if recognizing the unsatisfactory posture of the litigation for providing meaningful adjudication and relief, commented that

"on remand it is possible that some employers...may move to intervene." 662 F.2d, at 538. But to secure full participation only by torturing the meaning of Rule 19 to avoid dismissal, in the hopes that the absent parties will then take it upon themselves to protect their interests, is not an appealing basis for the result reached by the Court of Appeals. It is respondents who have sought to affect the hiring practices of some 4500 employers; it is respondents, and not the absent employers, who should shoulder the responsibility of joining the necessarily affected employers or suffering dismissal of their lawsuit.

If I only disagreed with The Court of Appears's conclusion, this case would not merit this Court's attention. However, in chosing this approach over the District Court's reasoned, pragmatic

path, the Court of Appeals has, I believe, embraced a significant departure from the meaning of Rule 19. Since courts will not, I am confident, begin issuing injunctions against non-parties, the approach of the Court of Appeals will tend to reduce the district courts to issuers of "'paper' decrees which neither adjudicate nor, in the end, protect rights." Schutten v. Shell Oil Co., 421 F. 2d 869, 874 (CA5 1970). This is hardly a sound way to expend the energies of overburdened district judges. Furthermore, plaintiffs will be frustrated by their failure to obtain effective relief, but will gain this frustration only after lengthy litigation and the attendant inconvenience and expense, instead of reaching the same practical result after relatively brief proceedings. Indeed, the only genuine

beneficiaries of the Court of Appeals's approach are attorneys who may be able to collect statutory attorneys' fees from defendants on the basis of a legal "success," without having gained anything of practical value for their clients.

Since the Court of Appeals held the employers were not necessary parties, it did not reach the question whether they were also indispensible parties under Rule 19(b). It will thus suffice for me to indicate my agreement with the reasoning of the District Court on this question as well. I would grant the petition for certiorari.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 79-4482
D.C. No. C75-2062-CBR

LINDA ELDREDGE and CHRISTINE A. MAZUR, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant-Appellee.

OPINION

Appeal from the United States District for the Northern District of California
Charles B. Renfrew, District Judge, President

Argued and Submitted: March 11, 1981

E-1

OPINION

Before FLETCHER and NELSON, Circuit Judges, and KEEP*, District Judge.

FLETCHER, Circuit Judge:

This is an appeal from the district court's order dismission the action for failure to join indispensable parties. Fed. R. Civ. P. 19.[1/] The opinions are reported at 20 Fair Empl. Prac. Cas. 897 (N.D. Cal. 1979) and 440 F. Supp. 506 (N.D. Cal. 1977). We reverse and remand.

I

FACTS

The facts underlying this suit are recounted in great detail in the district court opinion, 440 F. Supp. at 510-14, and need only be summarized here. Plaintiffs Eldredge and Mazur brought suit

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* The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.

under Title VII, 42 U.S.C. § 2000e-2, against the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee (JATC), alleging sex discrimination in the operation of JATC's apprenticeship program. Plaintiffs brought the suit as a class action, but the district court has not yet considered the question of class certification.

Defendant JATC is a joint labor-management committee established under an agreement that provides for a trust fund contributed to by the parties to the master collective bargaining agreements in the Northern California construction industry. JATC is composed of equal numbers of labor and management representatives, and acts as a board of trustees for the administration of the Carpenters Apprenticeship and Training Trust Fund for Northern California. It is responsible

for establishing, supporting, and maintaining programs to educate and train journeymen and apprentices in all classifications covered by any collective bargaining agreement that requires employer contributions to the trust fund. 440 F. Supp. at 510-11.

Plaintiffs allege that the process by which JATC selects applicants to its apprenticeship training program discriminates against women. Although JATC has employed other selection procedures in the past, see id. at 511-12, it presently relies on what is known as the "unrestricted hunting license" system. Under this system, an individual must first convince an employer to hire him or her as a beginning apprentice. JATC then places the individual's name on its applicant register. Id. at 512. The applicant enters into an apprenticeship a

agreement with JATC and is dispatched through the union hiring hall. Id. An individual needs no prior training to become an apprentice; all that is required is that he or she be 17 years of age and have a high school diploma or its equivalent. Id. at 511.

The master collective bargaining agreements under which JATC operates require employers to hire one apprentice for every five journeymen employed. The apprenticeship is a four-year program. Employers are under no obligation to hire beginning as opposed to experienced apprentices. Id. at 519. In May of 1976, only thirteen of JATC's 3220 registered apprentices were women. Id. at 514.

The essence of plaintiffs' complaint is that, by relying on the unrestricted hunting license system to recruit apprentices, JATC has adopted an entrance

requirement for its program which is known to have a discriminatory effect on women. Plaintiffs argue that JATC knows that individual employers do not hire women under the unrestricted hunting license system, and that JATC's use of this system is therefore illegal under Title VII. The district court assumed for the purposes of its rule 19 analysis that plaintiffs had stated a claim on which relief could be granted. 440 F. Supp. at 518 (citing Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975), aff'd, 534 F.2d 715 (7th Cir. 1976).

The district court held that the 4500 employers and 60 union locals covered by the master labor agreement, or adequate representatives of their interests, were indispensable to the litigation under the standards imposed by rule 19(b).[2/] It ordered them

joined within 60 days. 440 F. Supp. at 527. Plaintiffs were granted extensions of time in which to explore the possibilities for joinder, see 20 Fair Empl. Cas. at 898-99, but joinder of all 4500 employers proved impossible. The plaintiffs then sought to join the Northern California Homebuilders' Conference (NCHBC) to represent the absent employers' interests.[3/] The court held this inadequate and dismissed the case. Id. at 900.[4/] We conclude that the employers are not necessary parties under rule 19(a) and thus cannot be indispensable parties under rule 19(b). We reverse.

II

ANALYSIS

Rule 19 requires two separate inquiries. First, are there persons who should be joined, either because their

own interests or the interests of the parties might be harmed by their absence? Such persons, referred to as "necessary parties," must be joined if feasible. Fed. R. Civ. P. 19(a). Second, if parties determined to be necessary under rule 19 (a) cannot be joined, should the action in "equity and good conscience" be dismissed? Only if the court determines that the action should be dismissed is the absent party labelled "indispensable." Fed. R. Civ. P. 19(b); see English v. Seaboard Coast Line Railroad, 465 F.2d 43, 48 (5th Cir. 1972).

The nature of the rule 19 inquiry is described at some length in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). The inquiry should focus on the practical effects of joinder and nonjoinder. Id.

at 116 n.12; Schutten v. Shell Oil Co., 421 F.2d 869, 874 (5th Cir. 1970). Rule 19 was revised in 1966 to emphasize its practical focus and to avoid the inflexible approach taken by many courts under the prior version of the rule. Id. at 871-74; see Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. at 106-07.

Rule 19(a) describes two categories of persons who should be joined if feasible. If the absent employers fall into either of these two categories, they are "necessary parties."

The first category comprises those persons in whose absence "complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a)(1). This portion of the rule is concerned only with "relief as between the persons already parties, not as

between a party and the absent person whose joinder is sought." 3A Moore's Federal Practice p. 19.07-1[1], at 19-128 (2d ed. 1980); accord, Morgan Guaranty Trust Co. v. Martin, 466 F.2d 593, 598 (7th Cir. 1972). The district court concluded that the absent employers could frustrate any relief granted against JATC, and that complete relief would therefore not be possible unless the employers were made parties. The court reasoned that the employers could defeat any order against JATC by refus- ing to hire any apprentices, by hiring only unregistered, nonunion apprentices, or by rejecting all female apprentices dispatched to them. 440 F. Supp. at 519-20. We believe that the district court misapprehended the legal inquiry required by rule 19(a)(1).

If JATC's activities violate Title

VII, a question not yet decided, then the court has both the power and the duty to enjoin those activities. The possibility that such an injunction may induce employers to avoid JATC's services, or ultimately to disband the training and referral system altogether, should not defeat the present action against JATC. JATC may not avoid its own liability for practices illegal under Title VII by relying on the employers' possible future conduct that might frustrate the remedial purposes of any court-ordered changes in the apprenticeship program. See, e.g., United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 132 & n.16 (8th Cir. 1969) (enjoining union from continuing discriminatory referral practices, even though those practices were required by collective bargaining agreement with

absent employers).

The district court appears to assume that the employers would discriminate against women because of their sex, and that they would refuse to hire women training in the apprentice program. There is no evidence to this effect in the record. On the contrary, the employers have previously participated, apparently successfully, in a state-mandated affirmative action program designed to increase the number of minority apprentices. See 440 F. Supp. at 511-12.

While it might be desirable to join all 4500 employers in order to eradicate sex discrimination in the industry, we conclude that relief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone. Both sides agree that JATC

has the power under the trust fund agreement to structure its apprenticeship program in any way it sees fit. 440 F. Supp. at 510-11. It is quite possible that a court-ordered restructuring of the program could effectively increase the participation of women in the apprenticeship program. See, e.g., EEOC v. Local 638, Sheet Metal Workers' Union, 565 F.2d 31, 34-35 (2d Cir. 1977).

The second inquiry required by rule 19(a) concerns prejudice, either to the absent persons or to those already parties. Rule 19(a)(2)(i) provides that a person should be joined if he claims an interest relating to the subject of the action, and the disposition of the action may "as a practical matter impair or impede his ability to protect that interest."

The district court held that the employers should be joined since they have a right to select their own employees, a substantial interest that they have a right to protect.[5/] We disagree. The trust fund agreement grants full authority to JATC to structure the apprenticeship program and to select the apprentices. We conclude that the employers have by contract ceded to JATC whatever legally protectable interest they may have had in selecting apprentices to be trained. On the other hand, without the joinder of the employers, any court order that may be entered to enjoin JATC to institute programs cannot go beyond the authority granted JATC under the trust fund agreement. The absent employers are thus assured that an injunction against JATC will not trench on any

rights reserved to the employers under the agreement. We must conclude that the employers' ability to protect whatever interest in employee selection they retain will not be "impaired or impeded" if they are not made parties. They are therefore not necessary parties under rule 19(a)(2)(i).

The district court was understandably concerned that the absent employers might have interests that would be unrepresented in the present suit. Although we have concluded that their interests are not the sort that would make the employers necessary under rule 19, on remand it is possible that some employers, or the NCHBC, may move to intervene. The district court may then consider whether to permit intervention under Fed. R. Civ. P. 24.[6/] See e.g.,

United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 846 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

We hold that the trial court erred in dismissing the case for nonjoinder of necessary parties. We REVERSE and REMAND for further proceedings.

FOOTNOTES

1/ Rule 19 provides in pertinent part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to the substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a

person as described in subdivision (a) (1) - (2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

2/ The trial court also decided two issues not raised in this appeal. It held that the plaintiffs had exhausted their administrative remedies, 440 F. Supp. at 515-18, and that the absent parties could be joined even though they were not named in the charge to the EEOC, id. at 524-26.

3/ The NCHBC is a large employers'

organization which negotiated the master labor agreement under which JATC operates. Not all of the employers who subscribe to the master agreement belong to the NCHBC. 20 Fair Empl. Prac. Cas. at 899.

4/ The plaintiffs also sought to join the United Brotherhood of Carpenters and Joiners of America, the international, to represent the union locals. The district court did not decide whether the international could adequately represent the locals because it decided that the action could not proceed in any case. 20 Fair Empl. Prac. Cas. at 899 n. 4.

5/ The district court did not find the employers necessary under rule 19(a)(2)(ii). See 440 F. Supp. at 522-24.

6/ Fed. R. Civ. P. 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or

prejudice the adjudication of the rights of the original parties.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 79-4482

LINDA ELDREDGE and CHRISTINE A. MAZUR, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant-Appellees.

ORDER

Filed: February 8, 1982

ORDER

Before FLETCHER and NELSON, Circuit Judges, and KEEP, District Judge.

This opinion filed November 4, 1981 is amended as follows:

On page 5755 of the slip opinion, in the final paragraph, the first sentence should be deleted and the following sentence inserted in its stead:

> The district court appears to assume that the employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC in this suit.

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc hearing,

and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b). The suggestion for a rehearing en banc is rejected.

APPENDIX G

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-75-2062-CBR

LINDA ELDREDGE, et al.,

Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant.

JUDGMENT

Filed: July 9, 1979

This Court having ordered plaintiffs to join as parties defendant certain employers and unions that the Court determined to be indispensable parties under Rule 19, and plaintiffs having failed to satisfactorily comply with the Court's order, and the Court having filed a Memorandum of Opinion on July 9, 1979,

IT IS HEREBY ADJUDGED that the action is dismissed without prejudice pursuant to Rule 41(b).

IT IS HEREBY FURTHER ADJUDGED that the parties shall bear their own costs.

Dated: July 9, 1979.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

ENTERED IN CIVIL DOCKET 7/11, 1979

APPENDIX H

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-75-2062-CBR

LINDA ELDREDGE, et al.,

Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant.

MEMORANDUM OF OPINION

Filed July 9, 1979

On September 30, 1975, plaintiffs Linda Eldredge and Christine Mazur filed this sex discrimination suit against defendant Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee ("JATC"), alleging that defendant had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d). Defendant JATC is a joint labor-management committee that serves as a board of trustees responsible for the administration of the Carpenters Apprenticeship and Training Trust Fund for Northern California. The trust fund was created by a 1963 agreement among representatives of various local unions of the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) and various associations of contractors who employ carpenters in Northern California.

Pursuant to its authority under the trust fund agreement, defendant JATC has established a four- year apprenticeship program leading to journeyman status upon the completion of a specified number of hours of classroom training and on-the-job experience. In order to gain admission into a JATC training program, one must obtain place- ment on a new applicant referral list maintained by a district office of the JATC and one must be referred to a job as a beginning apprentice.

There are two methods of obtaining such a job referral. One approach is to await referral in numerical order off the new applicant referral lists. If an employer calls a union dispatcher and seeks a beginning apprentice without re- questing a particular individual, the next apprentice on the JATC's referral

list will be referred. In their original complaint, plaintiffs alleged that the JATC had violated Title VII through engaging in discriminatory practices in the placement of women on the new applicant referral lists. Plaintiffs claimed that they had been treated less favorably than male applicants when seeking placement on such lists.

Applicants rarely obtain jobs through numerical referral, however, for employers very seldom call in for a beginning apprentice without requesting a particular individual. The vast majority of those admitted to the JATC training program obtain a job referral through the "hunting license" method, which enables an individual to seek employment on his own. After finding a contractor willing to employ him as an

apprentice for at least 60 days, an individual may obtain a letter of subscription signed by that employer, place his name on the new applicant referral list, and then be dispatched to work for that employer.[1]

After discovery in this suit revealed the unlikelihood of receiving a numerical referral off the new applicant referral lists, both plaintiffs unsuccessfully attempted to find employment through the "hunting license" method. They then amended their complaint to allege that defendant's maintenance of this alternative method of securing job referrals violates Title VII. The amended complaint alleges that

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1 A more detailed explanation of the factual background of of [sic] this case is provided in the Court's earlier opinion, Eldredge v. Carpenters 46 Northern California, etc. 440 F.Supp. 506 (N.D. Cal. 1977).

employers' discrimination against women operates thorugh [sic] the "hunting license" system to exclude women from apprenticeships.

Following plaintiffs' amendment of their complaint, the Court concluded that since the numerical referral method plays such a minor role in the job referral system, plaintiffs' efforts to obtain relief that would increase women's chances of gaining admission to defendant's apprenticeship program should be directed at the "hunting license" system rather than the numerical referral method. In fact, the remedy plaintiffs propose did involve elimination of the "hunting license" system:

> "Plaintiffs have not specified the precise system they seek to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice

> to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of anumber [sic] of non-discriminatory techniques." Eldredge v. Carpenters 46 Northern California, etc. 440 F.Supp. 506, 514 (N.D.Cal. 1977) (footnote omitted).

Thus, the relief contemplated would substantially alter the present system of hiring beginning apprentices.

In order to grant effective relief and to enable the employers to protect their interest in selecting their own employees, this Court ordered that the affected employers be joined as indispensable parties under Rule 19.[2]

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2 Although the Court was primarily concerned with the need to join the employers, the Court also concluded, for reasons set forth in the earlier opinion, that the local unions that refer applicants registered with JATC to employment should be considered indispensable parties. Eldredge, supra, 440 F.Supp. at 524.

440 F.Supp. at 519-527. In so doing, the Court recognized the substantiality of the employers' interest in preserving the present hiring system:

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> "Even where there are no objective qualifications for a job, the interest of an employer in selecting those who, for any nondiscriminatory reason, he believes to be more highly motivated or more compatible with his existing work force, is not an insubstantial one. * * * It is no doubt true that the '"unstandardized and subjective"' judgments presently being made "'lend themselves to arbitrary and discriminatory hiring'" [citations omitted], and plaintiffs have suggested that such results have occurred in this case. Nevertheless, the employers are entitled to their day in court to contest these allegations before the Court issues an order abolishing the prerogatives they presently enjoy." 440 F.Supp. at 522.

This Court concludes that the employer contributors to the trust fund and the local unions that refer

applicants registered with JATC to employment were indispensable parties in whose absence the action could not in equity and good conscience proceed. On November 3, 1977, the Court ordered that if such parties were not joined within sixty days or within such further time as the Court might, on good cause shown, allow, the action would be dismissed, Eldredge, supra, 440 F.Supp. at 527.

Plaintiffs' Motion to Join Additional Parties Defendant.

Plaintiffs have engaged in extensive discovery in order to determine which employers and unions should be joined and whether certification of defendant classes or joinder of employers' associations and the international union might serve as an alternative means of complying with the Court's order. In order to afford plaintiffs sufficient

time to obtain and analyze the voluminous data relating to the affected employers and local unions, the court granted an extension of the time limit originally set for effecting joinder.[3]

Plaintiffs have moved to amend their complaint to join the Northern California Homebuilders' Conference ("NCHBC"), an employers' association, and the United Brotherhood of Carpenters and Joiners of America, the international union, as additional parties defendant. Defendant JATC seeks dismissal of the action arguing that joinder of these parties does not comply with the Court's order of November 3, 1977. The most significant objection raised by defendant is that plaintiffs

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3 The Court first granted an extension of the time limit to April 2, 1978, and later granted a (continued)

have failed to establish that the NCHBC could adequately protect the interests of all employers involved in the JATC apprenticeship program. Although plaintiffs emphasize that NCHBC negotiates the lead collective bargaining agreement governing carpentry in Northern California, this fact alone does not establish that NCHBC could represent the interests of the numerous employers who would be affected by a court order directing the JATC to institute a new job referral system. Since many of the affected employers are not even members of the NCHBC, but are represented by other contractors' association or are independent contractors, joinder of NCHBC does not

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further extension allowing plaintiffs through January 1, 1979, to join additional parties defendant.

fully satisfy the Court's concerns regarding representation of the employers' interest in preserving the present hiring system. Plaintiffs consider NCHBC "the part most capable of representing employer interests." Yet even assuming that NCHBC is the single party most capable of representing the employer interests at stake here, which plaintiffs have not shown, the Court is not persuaded that joinder of this one contractors' association is a satisfactory substitute for joinder of the individual employers who would be affected by the proposed decree. Furthermore, the declaration submitted by Mr. Wesley Sizoo, an attorney for NCHBC, in support of JATC's opposition to plaintiffs' motion to amend, status that no employer or member organization of NCHBC has consented to have NCHBC

appear on its behalf in this action. Plaintiffs have not contradicted the statement that NCHBC is not authorized to represent the employer interests here, nor have they provided the Court with a basis for concluding that NCHBC could effectively represent those interests.

The Court therefore finds that plaintiffs have not adequately complied with the Court's order of November 3, 1977, insofar as it directed joinder of the employer contributors to the Carpenters Apprenticeship and Training Trust Fund for Northern California.[4] Accordingly, the action must be dismissed under Rule 41(b) for failure

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4 Since the case must be dismissed for failure to join the affected employers, it is unnecessary to consider whether plaintiffs' proposed joinder of the international union would serve as an adequate substitute for joinder of the affected local unions.

to comply with the Court's order directing joinder of indispensable parties.

Defendant's Motion for Attorneys' Fees and Costs

Defendant JATC seeks an award of costs and an award of attorneys fees for the period following the Court's November 3, 1977 opinion. In support of the motion for attorneys' fees, defendant relies primarily[5] on Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1977), in which the Supreme Court held:

> "[A] district court may in its discretion award attorneys's fees to a prevailing

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5 In addition, defendant apparently contends that 28 U.S.C. §1927, which permits the Court to require an attorney personally to satisfy excess costs incurred because of the attorney's unreasonable and (continued)

> defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

Defendant asserts that plaintiffs proceeded in an unreasonable and frivolous manner by engaging in extensive discovery regarding the identify of those employers, employers' associations, and labor organizations that are involved with the JATC

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vexatious litigation, could serve in a Title VII suit as a basis for imposing liability on the attorney for attorney's fees incurred because of such unreasonable conduct. This argument is based on the provision in Title VII permitting the court to award the prevailing party "a reasonable attorney's fee as part of the costs." 42 U.S.C. §2000e-5(k). Since the plaintiffs' attorney in this case did not act so unreasonably that costs could be imposed under 28 U.S.C. §1927, defendant's argument need not be considered, yet the Court notes that it would be very difficult to construe 28 U.S.C. §1927 as authorizing an award of attorney's fees.

apprenticeship program and by then moving to amend the complaint to join NCHBC and the international union, rather than individual employers and the local unions. Defendant views plaintiffs' proposed joinder of these two parties as an unreasonable failure to make use of the information obtained through discovery and states that plaintiffs have acted in total disregard of the reasoning of the Court's November 3, 1977 opinion.

Although plaintiffs' proposed second amended complaint does not adequately comply with the Court's order regarding indispensable parties, plaintiffs have not proceeded in a manner that could be categorized as "frivolous," justifying an award of attorneys fees. Rather, they have attempted to comply with the Court's order in the face of great

difficulties arising from the fact that the affected employers are so numerous that it is impractical to join them all as individual defendants. Plaintiffs cannot be faulted for considering joining contractors' associations in lieu of employers, as this alternative was referred to in the Court's earlier opinion and not conclusively rejected. Eldredge, supra, 440 F.Supp. at 526-527.

Defendant's memorandum regarding the requested award of costs and attorneys' fees does not specifically address the issue of costs, yet it seems to assume that where a case is dismissed due to plaintiffs' failure to join indispensable parties the defendant should be considered a "prevailing party" within

the meaning of Rule 54(d).[6] Certainly defendant JATC is not a "prevailing party" in the sense of having successfully defended the suit on the merits, nor is this a case where plaintiffs voluntarily dismissed the suit.[7] Even assuming that defendant JATC should be

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6 Federal Rule of Civil Procedure 54(d) provides, in relevant part:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs ***."

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7 In Corcoran v. Columbia Broadcasting System, Inc., 121 F.2d 575 (9 Cir. 1941), the Court of Appeals for the Ninth Circuit considered the meaning of the term "prevailing party" as used in a statutory provision governing an award of attorneys' fees. The court concluded that the defendant was a "prevailing party" although the case had not gone to trail on the merits. Since the plaintiff had voluntarily dismissed the suit, the defendant was the prevailing party "within the spirit and intent of the statute." 121 F.2d at 576.

considered a "prevailing party," Rule 54(d) does not compel an award of costs. The rule provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." In this case the most equitable resolution of this matter is to have each side bear its own costs. Plaintiffs have diligently though unsuccessfully attempted to comply with the Court's order requiring joinder of indispensable parties. The Rule 19 issue that arose in this case presented complex legal questions and particularly difficult practical problems because of the factual setting of this suit. This is not a case where defendant can be said to have "prevailed" in the usual sense. Rather, considerations of equity prevented the suit from continuing without the joinder

of parties who as a practical matter could not be joined.[8] The Court of

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8 While the Court is convinced the result reached here is required for the reasons set forth above, it is nonetheless troubled by the seemingly harsh result. Counsel for plaintiffs have devoted a substantial amount of time and effort in vigorously prosecuting this case. Because the Court is desirous that women be afforded equal opportunitites in all areas of employment, including the construction industry, the Court asked counsel for JATC at a status conference in chambers whether JATC would take every step to insure that women would be given every opportunity to be employed as carpenters. In a proposed statement submitted to the Court and counsel for plaintiffs, defendant JATC "reaffirm[ed] [its] desire and intention to exert [its] best efforts to assist women in becoming more active and involved in participation in the carpentry craft through greater participation in the carpenter apprenticeship program. The JATC will communicate with participating carpenter local unions and with individual employers and employer associations to make them aware of the opportunities for employing female apprentices, and will encourage individual employers to hire qualified female apprentices. It is the intention that these efforts will result in an awareness of individual employers to the employment (continued)

Appeals for the Ninth Circuit has stated that "the awarding of [costs under Rule 54(d)] is discretionary with the trial judge." K-2 Ski Company v. Head Ski Co., 506 F.2d 471, 476-477 (9 Cir. 1974). The Court concludes that in this case discretion should be exercised to deny the award of costs sought by defendant JATC.

Accordingly, IT IS HEREBY ORDERED that plaintiffs' motion to join additional parties defendant is denied, and the case is dismissed without prejudice pursuant to Rule 41(b) on the ground that plaintiffs have failed to

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of women and a substantial increase in the number of females enrolled in the apprenticeship program." The Court expects that defendant JATC will adopt this statement and exercise its best efforts toward these laudable goals. Hopefully the ultimate relief sought by plaintiffs may be obtained by this informal method.

comply with the Court's order to join indispensable parties.

IT IS HEREBY FURTHER ORDERED that defendant's motion for an award of attorneys' fees and costs is denied, and the parties shall bear their own costs.

Dated: July 6, 1979.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-75-0262-CBR

LINDA ELDREDGE, et al.,

Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant.

AMENDED MEMORANDUM OF OPINION

Filed: November 3, 1977

Plaintiffs Linda Eldredge and Christine A. Mazur filed this sex discrimination action on September 30, 1975. The complaint alleged that the defendant Carpenter 46 Northern California Counties Joint Apprenticeship and Training Committee ("JATC") had violated Title VII of the Civil Rights Act of 1965, 42 U.S.C. §2000e-2(d), by denying female applicants equal opportunity for placement on the new applicant referral lists used to supply names to union dispatchers for referral of applicants to jobs as beginning apprentices. Plaintiffs sought preliminary relief; certification of a class composed of all women who applied to the JATC for placement on those lists between August 18th and 29th, 1975;[1]

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1 Plaintiffs have not amended the complaint to allege any larger class. However, they state in (continued)

orders requiring the JATC to place and refer applicants in the order in which they apply and to establish an affirmative action program for women; damages including back pay; and costs of suit.

Plaintiffs' motion for a temporary restraining order was denied on October 3, 1975. Although the Court simultaneously ordered the defendant to show cause why a preliminary injunction should not issue, a hearing on that order was withdrawn from the calendar pursuant to a stipulation and order on December 30, 1975. On July 16, 1976, defendant noticed a motion to dismiss the action or

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their Memorandum in Support of Plaintiffs' Motion to Certify Action as a Class Action, filed August 26, 1976, at 1, that the class is to include all women who were discriminatorily denied admission to defendant's apprenticeship and training program at any time since August of 1973.

for summary judgment; on August 26, 1976, plaintiffs moved to amend their complaint, for class certification, and for summary judgment. Each of these motions was extensively briefed by both parties, and oral arguments were heard on September 16, 1976. On September 30th, plaintiffs' motion to amend the complaint was granted, and an amended complaint was filed February 10, 1977. The principal effects of the amendment were to delete the prayer for damages and preliminary relief, and to add new allegations of discrimination. In addition to the alleged discrimination in placement on referral lists, plaintiffs now allege that defendant's system for referring new applicants to the job necessary for admission into apprenticeship, under which the vast majority of new applicants are referred not in numerical order off

lists but as they are requested by name by contractor-employers, is itself discriminatory in effect. Since the amended complaint alleges that illegal effects result from the operation of a system in which parties not before the Court are intimately involved, the Court on February 10, 1977, requested the submission of further factual information and briefing relating to defendant's suggestion that employers and labor unions in the Northern California carpentry trade are indispensable parties to the action. (Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed September 9, 1976, at 6-7.) Defendant filed a memorandum on this point on March 18, 1977, to which plaintiffs responded on May 9th.

The issues presently befcre the Court are (1) whether the action must be

dismissed for failure to exhaust state and administrative remedies; (2) whether all necessary parties as defined by Rule 19, Fed.R.Civ.P., are presently before the Court; (3) whether class certification is appropriate; and (4) the cross motions for summary judgment. For the reasons set forth below, the Court concludes that plaintiffs have exhausted their remedies within the meaning of Title VII, but that the affected employers and unions must be joined prior to any further disposition of the case.

I. FACTUAL BACKGROUND

Defendant JATC is a joint labor-management committee composed of equal numbers of employer and employee representatives. The committee serves as board of trustees responsible for the administration of the Carpenter Apprenticeship and Training Trust Fund for

Northern California ("Fund"), which was created by a 1963 agreement ("trust fund agreement") among representatives of various local unions of the United Brotherhood of Carpenters and Joiners of America (AFL-CIO) and various associations of contractors who employ carpenters in Northern California. The agreement grants the defendant, as board of trustees, "the power and duty *** to establish, support or maintain programs *** for the purpose of educating and training persons as journeymen or apprentices" in all classifications covered by any collective bargaining agreement requiring employer contributions to the Fund.[2] To meet

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2 The Northern California carpentry trade is governed by two master agreements which are identical in all respects relevant to this action. Carpenters Master Agreement and Hiring Procedures between the (continued)

the obligation, defendant has developed a set of apprenticeship standards and established a four-year apprenticeship program leading to journeyman status upon the completion of a specified number of hours of classroom training and on-the-job experience. The procedures for selecting among applicants to enter this program are the subject matter of this suit.

Northern California Home Builders Conference et al. and the Carpenters 46 Northern Counties Conference Board, Exhibit 11 to the deposition of Charles F. Hanna, filed August 26, 1976; Carpenters' Master Agreement (1974-1977) between the Associated General Contractors of California, Inc., et al. and the United Brotherhood of Carpenters and Joiners of America, Exhibit 12 to the deposition of Charles F. Hanna, supra ("Master Agreements"). Individual employers neither participate in negotiations nor sign these agreements. Instead, they sign brief Memorandum Agreements by which they agree to comply with a master agreement, to contribute to various trust funds, including the apprenticeship and training trust fund, in the amounts specified in the master agreement, and to be bound by all obligations imposed by the corresponding trust fund agreements.

No selection procedures are specified in either the trust fund agreement or the relevant collective bargaining agreements. Authority to establish such procedures in each of 43 local regions has been delegated to separate local Joint Apprenticeship and Training Committees ("local JATC's"). However, those local bodies are required to operate within the framework of policies adopted by the defendant, and most administrative tasks are performed by defendant's ten District Offices. Until 1974, procedures varied from region to region, but in that year defendant instituted a program imposing uniform selection procedures designed to bring all 46 counties governed by the trust fund agreement into compliance with provisions of state and federal law requiring joint apprenticeship committees to

adopt affirmative action plans to increase the number of minorities in the trade.[3] The new procedures were embodied in "Annex C-1," an Equal Opportunity Addendum to the Carpenters 46 Northern California Counties Apprenticeship Standards, and were approved by the California Administrator of Apprenticeship. Local JATC's operated according to Annex C-1 until November 18, 1976, when the Santa Clara County Federation of Joint Apprenticeship and Training Committees obtained state approval of an "amended C-1." The majority of local

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3 See Secretary of Labor, Regulations on Equal Employment Opportunity in Apprenticeship Training 29 C.F.R. Part 30 (1976); Cal.Labor Code §§ 3070 et seq. and 3076 (West Supp. 1977); Cal.Adm.Code T. 8, Part 1, Ch. 2, §§200 et seq. Although California law was recently amended to require joint apprenticeship committees to set goals for women, the precise requirements and enforcement procedures of those new provisions are as yet unclear. Neither party relies on state law in this action.

JATC's have subsequently shifted to the amended C-1 upon findings by the Administrator of Apprenticeship that they have met their quotas for minorities. However, a few are still operating under the original Annex C-1.

Under both the original and the amended Annex C-1, the qualifications and requirements for admission to apprenticeship are the same: to be qualified, an applicant must be at least 17 years of age and have a high school diploma, G.E.D., or equivalent; to gain admission, he must obtain a position on a new applicant referral list maintained by a local JATC and a referral slip from a local union dispatching him to a job as a beginning apprentice. Once an applicant has satisfied both the listing and the job requirements, he may sign an apprenticeship agreement at one of de-

fendant's district offices, join the union local, and attain the status of "registered" or "indentured" apprentice eligible for classroom training under JATC auspices. All subsequent job referrals for registered apprentices are handled exclusively by the union locals pursuant to collective bargaining agreement. JATC participation in such procedures is limited to the referral of new applicants to their first jobs.

The original Annex C-1 provides for a "closed list" system of first referrals. Only applicants listed on an existing new applicant referral list are eligible for referral, and placement on that list may only be obtained during limited open periods selected by local JATC's. Forty-five days prior to a scheduled opening, the local JATC sends announcements to news media, schools, employment services,

outreach programs, and others specifying the date and time of the opening, the duration of the open period, and the procedure for applying. At the specified time, applicants line up at the designated District Office and are given appointments to return and sign, in the order in which they appeared, the "applicant register" for the local JATC from which they desire to be referred. The names of those who are qualified are placed on the new applicant referral list in that order up to a maximum of one and one-half times the estimated number of persons to be referred during the referral period. The list is reviewed by a district coordinator for compliance with affirmative action goals, posted, and distributed to local union dispatchers. Applicants named thereon remain in the pool of those eligible for

referral for two years, and may be referred in two ways. First, each applicant is given a letter of subscription or "hunting license," which he may use to seek employment on his own. When he finds a contractor willing to employ him as a registered apprentice for at least sixty days, that employer's signature on the letter will upon presentation to the union dispatcher entitle the applicant to a referral slip. Second, an applicant may await placement off the new applicant referral list simply by keeping the JATC apprised of a telephone number where he can be reached within 24 hours. When an employer calls the union dispatcher and requests a beginning apprentice without specifying any particular individual, the dispatcher obtains from the JATC District Office the name of the first ranking applicant in numerical order on the list

and issues a referral slip for that person. After receiving a referral slip by either method, the applicant is indentured.

Although the original C-1 provided considerable room for employer judgment in the selection of new apprentices, it generated dissatisfaction among employers because it restricted the use of the hunting license and thus the potential apprentices available for hire to those named on an established list. The objection provided the impetus for adoption of the amended C-1, which establishes an "open list" or "unrestricted hunting license" procedure. An applicant must still obtain a position on the new applicant referral list prior to indenture, but he may do so at any time and regardless of the number of applicants already on the list. Thus, any

individual, whether or not listed with the JATC in advance, may obtain a letter of subscription signed by an employer, place his name on the applicant register, enter into an apprenticeship agreement, and be dispatched to work as a registered apprentice forthwith. The only significance of the list under this system is that the rare employer who calls in for a beginning apprentice without naming an individual will receive the applicant highest in numerical order on that list. It is not disputed that employers are reluctant to hire apprentices by this method, sight unseen. Of 288 new applicants referred to jobs from the implementation of Annex C-1 until June of 1976, only six, or two per cent [sic], obtained jobs in this way.

Plaintiffs were not aware until mid-1976 of the near futility of awaiting

numerical referral off the new applicant referral lists. Believing high placement on the list to be crucial to entry into defendant's program, each plaintiff lined up outside a JATC District Office at midnight on August 17, 1975, nine hours before the scheduled opening for applications. Ms. Eldredge thereby obtained the eighth position in line outside the District 5 (San Francisco) Office and Ms. Mazur obtained the eighth position outside the District 8 (Martinez) Office. Ms. Eldredge and Ms. Mazur did subsequently receive the corresponding eighth positions on local JATC new applicant referral lists at San Francisco and Martinez, respectively. However, each plaintiff alleges that she encountered an "atmosphere of discrimination that was hostile and discouraging to women" during the application process.

Specifically, Ms. Eldredge states that the first person in line at San Francisco, a woman, was originally given the number two appointment slip to return and sign the applicant register. The error was corrected at the request of the woman, but when she returned to sign, she did so over a long strip of white tape which had been placed over the number one spot. Ms. Eldredge further alleges that Percy Long, Apprenticeship Coordinator for District 5, was evasive in answering her questions as to how applicants were placed on new applicant referral lists and how they would be referred to jobs.

Ms. Mazur states that she applied at the Martinez District Office specifically in order to obtain referrals for Richmond area, where she understood new apprentices were in greater demand, and that she was deprived of the opportunity

to sign the Richmond register when District 8 personnel failed to inform her and other women in line that two separate sets of numbered appointment slips were being distributed: one for applicants who wished to sign the Richmond local register. Arlis Paslay, Supervisor of the District 8 Apprenticeship Program, announced to those in line that anyone from the Richmond, El Sobrante, or San Pablo area should obtain appointment slip from his secretary while those from Eastern Contra Costa County should do so from him. Although Ms. Mazur heard the announcement, she attached no significance to it in light of her Oakland residence, and as a result obtained the number eight appointment slip for Martinez from Mr. Paslay. When she returned to sign the register, she learned for the first time of the

Richmond register but was told she could not sign until after all those with Richmond appointment slips had done so. Because two men who were behind Ms. Mazur in line and who similarly were unaware of the existence of two sets of slips were permitted to sign the Richmond register in fourth and fifth positions, plaintiff feels there has been differential treatment on the basis of sex. However, neither man remembers clearly how he came to sign the Richmond register, and both are residents of San Pablo. Deposition of Joe A. Silveira, filed Feb. 24, 1976, at 6, 14-21; Deposition of Victor Louro, filed Feb. 24, 1976, at 6, 13-17. There is no evidence to suggest that either obtained his position on the Richmond register by anything but routine application of the procedure described by Mr. Paslay.

On or about September 2, 1975, each plaintiff filed formal charges with the Equal Employment Opportunity Commission ("EEOC") alleging that she had suffered discrimination in attempting to obtain a position on defendant's new applicant referral lists. The EEOC on September 8th referred the charges to the California Fair Employment Practices Commission ("FEPC"), as required by 42 U.S.C. §2000e-5(c), with the recommendation that the case was appropriate for immediate preliminary injunction.[4] By notification of September 11, 1975, the FEPC replied that it would not process the

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4 See Notice of Deferral Transmittal, dated 8 Sep. 1975, attached as Exhibit D to defendant's Memorandum in Support of Defendant's Motion to Dismiss, etc., filed July 16, 1976. Although the EEOC request does not itself appear on this form, the FEPC response cites that request as the reason for the state's failure to process the claim.

charges in light of the EEPC recommendation, and on September 29th the EEPC issued right-to-sue letters to both plaintiffs on the ground that it would not be able to investigate, conciliate or file suit within 180 days. Upon receipt of those letters, plaintiffs filed this action.

Despite the alleged discrimination, both plaintiffs had fulfilled the first requirement for admission to apprenticeship when their names were placed on new applicant referral lists. Accordingly, they were eligible for job referrals pursuant to the original Annex C-1 then in effect. Each attended an orientation meeting in late September, 1975, at which she was informed of the two alternative methods of obtaining a referral, but because each believed it was unlikely she could convince a contractor to request a

woman by name, neither initially used her "hunting license" to seek employment on her own. Although each plaintiff continuously maintained a current telephone number in the hope of receiving a numerical referral, neither has been dispatched by that method. In August, 1976, after Ms. Mazur had received a letter from the Martinez JATC stating that many applicants were finding jobs on their own, after defendant had moved for summary judgment in this action, and after discovery had revealed the unlikelihood of numerical referral, both plaintiffs unsuccessfully attempted to find jobs by contacting contractors. At the same time, they sought to amend their complaint to allege that defendant's maintenance of the "hunting license" system as an alternative method of securing job referrals itself violates

Title VII.

As of May, 1976, defendant's records show 3,220 registered apprentices, only 13 of whom are women.[5] Of the approximately 1700 persons who obtained positions on new applicant referral lists when applications were opened in August 1975, 92 are women, but as of May, 1976, only four, or four percent of the women on those lists had been dispatched to jobs while 398, or 25 percent of the men had been dispatched. Plaintiffs now contend that this low representation of women is the result of the establishment and maintenance by defendant of the "hunting license" system, ostensibly as

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5 In a subsequent affidavit, Charles F. Hanna states that 25 women are currently enrolled as apprentices. Affidavit of Charles F. Hanna, filed March 10, 1977, at 11. However, no complete statistics later than those of May, 1976, are presently before the Court.

an alternative method of obtaining the first job referral necessary for admission, but in fact knowing that because of employer preference, it is the nearly exclusive method. They have submitted the affidavits of three female apprentices and one female applicant, as well as a letter signed by twelve female apprentices, describing the employer discrimination against women which, they allege, operates through the hunting license system to exclude women from apprenticeship. The act of discrimination complained of on this theory is thus the defendant's use of a system that passes the decision as to who may enter the program to others who are known to discriminate against women.

Although plaintiffs continue to complain of discriminatory practices in the placement of women on new applicant re-

ferral lists, the relative insignificance of placement on those lists as long as the hunting license system remains available suggests that any relief directed to such practices alone would in no way enhance the ability of women to gain admission to defendant's program.[6] Such relief would be appropriate only if the JATC were first ordered to abolish the hunting license system and to institute a new system for referring applicants to employment, eliminating the present discretion of employers to select new apprentices from those who apply to them. Plaintiffs have not specified the precise system they seek to have

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6 Even Ms. Mazur, who seeks an order granting her and others similarly situated their "rightful places" on the Richmond new applicant referral list, has failed to show that she would have been referred to a job if she had been given a place on that list rather than the Martinez list.

instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of non-discriminatory techniques.[7]

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7 Possibilities include the hiring hall system currently used for referral of journeymen to jobs; selection on the basis of the rank order of scores of applicants on one or more qualification standards; random selection from a pool of eligible applicants; selection on an equal basis from separate lists established for minorities, women, and all others; and random or numerical selection from a pool of eligibles chosen by a system guaranteeing population parity. Affidavit of B. J. Miller in Support of Plaintiffs' Statement of Position, filed May 16, 1977; Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed August 26, 1976, at 7-8.

II EXHAUSTION OF REMEDIES

Title VII provides an independent basis for federal jurisdiction over actions pursuant to its terms. 42 U.S.C. §2000e-5(f)(d). Prior to seeking judicial relief, however, plaintiffs must exhaust both state and administrative remedies. Specifically, section 2000e-(5)(c) requires that they first file charges with the state agency, if any, charged with authority to enforce state employment discrimination laws, and await state action for sixty days unless proceedings are earlier terminated; and section 2000e-5(f)(1) requires that they file timely charges with the EEOC, defer filing suit for 180 days after those charges are filed, and obtain a right-to-sue letter from the EEOC. Defendant argues that plaintiffs have not satis-

fied the state exhaustion requirement and that the action must accordingly be dismissed. This contention is without merit.

Even where the deferral requirement is not satisfied, dismissal is unnecessary; the proper course is to retain jurisdiction while plaintiffs seek redress from the state agency. Waters v. Heublein, Inc., 547 F2d 466, 468 (9 Cir. 1976), cert.denied, 45 U.S.L.W. 3840 (1977); Equal Employment Opportunity Commission v. Wah Chang Albany Corp., 499 F.2d 187, 189 n.3 (9 Cir. 1974). That procedure is unnecessary in this case, however, since it is well settled that section 2000e-5(c) is satisfied by the procedure followed here: initial reference of the matter to the state agency that it will take no action. Love v. Pullman Co., 404 U.S. 522, 525 (1972);

Motorola, Inc. v. Equal Employment Opportunity Commission, 460 F.2d 1245, 1246 (9 Cir. 1972). Defendant contends that the FEPC's decision not to pursue the matter was improper under California law in that no reference was made to the Administrator of Apprenticeship and no hearing was provided. Regardless of the merits of this contention, see Cal.Labor Code §3096 (West Supp. 1977), violations of state law in the treatment of a claim do not offend the deferral rule: federal policy requires only that the state be afforded an opportunity to take the case. Pacific Maritime Ass'n v. Quinn, 465 F.2d 108, 110-111 (9 Cir. 1972). Finally, plaintiff's failure to allege deferral in their pleadings is of no significance, since no such allegations are required by Rule 8(a)(1), Fed.R.Civ.P. Equal Employment Opportunity Commission v. Wah Chang

Albany Corp., supra, 499 F.2d at 189.

A more difficult question is posed by plaintiff's undisputed failure to wait 180 days after the EEOC's assumption of jurisdiction before filing suit, as required by section 2000e-5(f)(1). There is a sharp division in the authorities as to whether this requirement is jurisdictional. Compare Budreck v. Crocker National Bank, 407 F.Supp. 635 (N.D.Cal. 1976), and Jones v. Pacific Intermountain Express, 10 F.E.P. Cases 914 (N.D.Cal. 1976), with Lewis v. FMC Corp., 11 F.E.P. Cases 31 (N.D.Cal 1975), and Howard v. Mercantile Commerce Trust Co., 10 F.E.P. Cases 158 (E.D.Mo. 1974). For the reasons stated in Budreck, supra, the Court adheres to the view that compliance with the statutory waiting period is ordinarily a prerequisite to the assumption of jurisdiction.

Plaintiffs apparently believe that their prayer for a temporary restraining order and a preliminary injunction made compliance with the statutory period unnecessary for all purposes. Memorandum of Law in Response to Defendant's Motion to Dismiss and for Summary Judgment, filed August 26, 1976, at 23-24. Such a per se rule cannot be supported. However, in the circumstances of this case the Court agrees that jurisdiction was properly assumed to entertain those motions, and that the passage of 180 days prior to hearing on a motion to dismiss cured the jurisdictional defect that would otherwise have required dismissal of the action for permanent relief.

At plaintiffs' request, the EEOC issued right-to-sue letters only 18 days after receipt of the case from the FEPC, and this action was filed the following

day. The result of this procedure was to foreclose any possibility of conciliation -- either formal or informal -- prior to the hardening of positions and narrowing of issues that inevitably follow the assumption of roles as adversary parties in a judicial proceeding, impairing further efforts at voluntary settlement. See Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975); Budreck v. Crocker National Bank, supra, 407 F.Supp. at 643-644. In the ordinary case, such short-circuiting of the time periods contemplated by the statute frustrates the intention of Congress to promote conciliation and voluntary settlement. Yet Congress itself recognized, by enacting a provision authorizing the EEOC to seek preliminary relief, 42 U.S.C. §2000e-5(f)(2), that the interest in enforcement may outweigh the policy

favoring non-judicial settlement when an aggrieved person is threatened with irreparable injury that imperils the adequacy of any final relief. Congress failed to similarly provide for private litigants, however, and their efforts to invoke the jurisdiction of federal courts on motions for preliminary relief pending administrative disposition of the underlying charges have met with mixed success.[8] The conflicting results

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8 For the view that courts have jurisdiction to hear claims for preliminary relief despite the failure to exhaust administrative remedies, see e.g., Drew v. Liberty Mutual Insurance Company, 480 F.2d 69 (5 Cir. 1973), cert. denied, 417 U.S. 935 (1974); Parks v. Dunlop, 517 F.2d 785 (5 Cir. 1975); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D.Mass.), aff'd 545 F.2d 222 (1 Cir. 1976). For the opposing view, see, e.g., Nottelson v. A. O. Smith corp., 397 F.Supp. 928 (E.D.Wis. 1975); Troy v. Shell Oil Co., 378 F.Supp. 1042 (E.D.Mich. 1974), appeal dismissed as moot, 519 F.2d 403 (6 Cir. 1975); Collins v. Southwestern Bell (continued)

derive from the courts' efforts to accommodate two competing concerns: first, that it would be unfair and unrealistic to require exhaustion where rights are threatened with irreparable harm, a failure to act may permanently foreclose adequate relief, and the EEOC's caseload precludes it from seeking preliminary relief, see Bowe v. Colgate

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Telephone Co., 376 F.Supp. 979 (E.D. Okla. 1974).

Other courts have blurred the distinction between jurisdiction and the availability of preliminary relief, and appear to hold that jurisdiction may be available only in cases where relief on the merits is appropriate, see Berg v. Richmond Unified School District, 528 F.2d 1208, 1211 (9 Cir. 1975), cert. granted, 45 U.S.L.W. 3508 (1977); Jerome v. Viviano Food co., Inc., 489 F.2d 965, 966 (6 Cir. 1974) (holding no irreparable harm and thus no jurisdiction where no existing employee-employer relationship); Donald v. Ray, 377 F.Supp. 986, 987 (E.D.Tenn. 1974); or only where the circumstances particularly demand such relief, Townsend v. Exxon Co., 420 F.Supp. 189, 193 (D.Mass. 1976) (retaliatory discharge).

Palmolive Co., 272 F.Supp. 332, 338 (S.D.Ind.1967), aff'd in part and rev'd in part, 426 F.2d 711 (7 Cir. 1969); Drew v. Liberty Mutual Insurance Company, 480 F.2d 69, 73-74 (5 Cir. 1973), cert.denied, 417 U.S. 935 (1974); and second, that to permit indi- viduals to bypass the statutory mechanism in cases where the EEOC does not seek prompt judicial relief would flood the courts with such requests, see Collins v. Southwestern Bell Telephone Co., 376 F. Supp. 979 (E.D.Okla. 1974).[9]

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9 A third concern occasionally mentioned is that without jurisdiction over the underlying cause of action, a court is precluded from providing relief of any sort. Troy v. Shell Oil Co., supra, 378 F.Supp. at 1048; Nottelson v. A. O. Smith Corp., supra, 397 F.Supp. at 933. This concern seems unfounded, however, in view of the principle established in other areas of administrative law that a court has power to preserve the status quo by staying private action pending an administrative decision. See Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1257 (1971).

Although the issue is currently before the United States Supreme Court, the law of this Circuit at the present time is that in a "limited class of cases" where there exists a high probability of success on the merits and the threat of irreparable harm, a court may entertain a suit to maintain the status quo pending administrative disposition. Berg v. Richmond Unified School District, 528 F.2d 1208, 1211 (9 Cir. 1975), cert. granted, 45 U.S.L.W. 3508 (1977). Although the facts of this case depart from the Berg rule in at least three respects, none of those differences calls for a change in the result. First, since the motion for a preliminary injunction was withdrawn from the calendar, the Court has made no findings on the merits. Nevertheless, the EEOC's evaluation of the case as one

appropriate for immediate preliminary injunction would appear to satisfy the threshold test that there be some substance to the claim. To permit suits only where such a determination is made need not lead to any flood of litigation. Second, plaintiffs' motions went beyond merely "maintaining the status quo," since plaintiffs were not employees seeking relief from threatened changes in the employment relationship, but applicants for admission to defendant's program. A few courts have drawn a distinction on this basis, see footnote 7, supra, but differential treatment is not justified by the policies involved: if a preliminary injunction is otherwise appropriate, it makes no difference to the injured plaintiff or to the enforcement of Title VII that the injury is to be imposed by

inaction rather than by action. Finally, plaintiffs arguably sought more than interim relief pending administrative disposition, since the EEOC had prematurely issued its final right-to-sue letter, thus terminating the administrative phase. See EEOC v. Pacific Press Publishing Association, 535 F.2d 1182, 1186 (9 Cir. 1976). However, the EEOC had certified that it would be unable to reach the case within the 180-day period. Thus, no administrative disposition was to be anticipated. Moreover, the prospects of informal settlement are unlikely to have been impaired by the initiation of the suit for permanent relief to any greater extent than they would already have been impaired by the filing of the motion for a preliminary injunction. To hold that the action was barred by an EEOC error

having no effect on statutory policy would indeed be pointless. Had the parties known that the 180-day period would be interpreted as jurisdictional, they could have limited their initial prayer to preliminary relief, waited 180 days, obtained a right-to-sue letter, and sought permanent relief, all without any significant substantive effect.

Although the Court thus concludes that jurisdiction was properly taken over the claims for preliminary relief, this conclusion does not in itself justify the assumption of jurisdiction over the underlying claim. that jurisdiction can only be justified if the lapse of 180 days between the EEOC's assumption of jurisdiction and the hearing on a motion to dismiss can cure the initial failure to meet that jurisdictional requirement. It is settled that subsequent receipt of

a right-to-sue letter can cure the jurisdiction in a suit initially filed without one, Berg v. Richmond Unified School District, supra, 528 F.2d at 1212, but the differing policies involved make it less clear that the mere passage of time, absent a dismissal and a refiling with the EEOC, should ordinarily be permitted to cure the jurisdictional defect of premature filing. Compare Budreck v. Crocker National Bank, supra, 407 F.Supp. at 647 n. 19, with Berg v. LaCrosse Cooler Co., 548 F.2d 211, 213 (7 Cir. 1977), and Troy v. Shell Oil Co., 519 F.2d 403 (6 Cir. 1975). Where the parties were properly before the Court in the first instance on motions for preliminary relief, however, the Court concludes that no policy would be served by a dismissal. The only departure from proper procedures was the premature

issuance of the right-to-sue letter and the resulting premature filing of a complaint for permanent relief. To dismiss now would not deter other litigants from seeking judicial action in circumstances where preliminary relief may be appropriate, and thus would not serve the policy of promoting informal settlement prior to the onset of litigation. It would no doubt discourage the EEOC from divesting itself of claims prematurely, and thus would serve the congressional purpose of providing ample opportunity for administrative action. Where the backlog of cases prevents an administrative disposition in any case, however, this result has insufficient practical impact to justify the imposition of hardship in a particular case.

III. RULE 19

It is no doubt true, as plaintiffs argue, that a joint apprenticeship committee cannot avoid liability under Title VII by delegating the responsibility for screening applicants to a third party. (See Crockett v. Green, 388 F.Supp. 912 (E.D.Wis. 1975), Aff'd 535 F.2d 715 (7 Cir. 1976). The relief contemplated in this case, however, will have substantial impact on both the employers who must hire apprentices if they are to receive on-the-job experience and the union which pursuant to collective bargaining agreement are responsible for the dispatch of all employees to jobs with signatory employers. Rule 19[10] does not, of

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10 Rule 19 provides in part:
"(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter (continued)

of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject to the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of this action improper, he shall be dismissed from the action.

"(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be (continued)

course, require joinder of all parties who may be affected by an order. The issues are, first, whether employer or union involvement is of such a nature that without them complete relief cannot be accorded those already parties, Rule 19(a)(1), and second, whether their interests are such that to proceed in their absence may as a practical matter prejudice them or subject the parties already before the Court to a substantial risk of incurring inconsistent obligations, Rule 19(a)(2). If either of these conditions is shown, Rule 19(a) requires that the absent parties be joined if to do so will not deprive the Court of jurisdiction over the subject

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lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

matter. If a party cannot be joined as required, Rule 19(b) calls for a second inquiry to determine whether in equity and good conscience the action should be dismissed.

Plaintiff's initial contention is that when no relief is sought against absent parties, those parties cannot be regarded as "indispensable." This argument is wholly without merit. By definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests. The cases cited by plaintiffs are not to the contrary. Each merely lists the failure to seek relief against the absent parties as one factor in a decision that joinder was not

required, in cases where no involvement or participation by those parties in the challenged discriminatory practices had been alleged. Hibbler v. Miller's of Birmingham Bankhead Highway, Inc., 496 F.2d 1171, 1172 (5 Cir. 1974); Waters v. Heublein, Inc., 11 E.P.D. p. 10,620 at 6587 (N.D.Cal. 1975), rev'd on other grounds, 547 F.2d 466 (9 Cir. 1976), cert.denied, 45 U.S.L.W. 3840 (1977). In contrast, the involvement of both employers and unions in the subject matter of this action is evident on the face of the amended complaint.

In a similar vein, plaintiff's contend that complete relief can be accorded by an order against the JATC alone, since pursuant to the trust fund agreement it is solely responsible for establishing and maintaining apprenticeship programs, since no particular procedure for

selecting apprentices is enshrined in any agreement to which absent parties are signatories, and since it alone selected and can abolish the "hunting license" system, subject to state approval. This agreement misconceives the nature of the issues under Rule 19(a)(1). Although the legal position of the present defendant and its theoretical ability to comply with an order are relevant, they may be outweighed by a finding that absent parties may as a practical matter prevent the full realization of the intended relief. The Court must guard against the formulation of "'paper' decrees which neither adjudicate nor, in the end, protect rights." Schutten v. Shell Oil Co., 421 F.2d 869, 874 (5 Cir. 1970). Thus the contractual rights and duties relied on by plaintiffs are only a starting point for a full consideration

of the actual role of each party in the formulation of the practices complained of and the stake each has in maintaining them. See LeBeau v. Libby-Owens-Ford Co., 484 F.2d 798, 800 (7 Cir. 1973).

A. The Employers

Employers are not obligated to hire beginning apprentices by either the master collective bargaining agreements governing the trade[11] or the trust fund agreement itself. They need only employ one apprentice (at any experience level) if five journeymen are employed, and one additional apprentice for each five journeymen thereafter. Master Agreement §40. When an employer does request a beginning apprentice, he retains the right to reject the individual dispatched "for any reason," Master Agreement §49

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1 [sic] See note 2, supra.

(9), subject only to liability for two hours "showup time" to be paid to the applicant, Master Agreements §30. No new system of referral adopted by the JATC could either require contractors to employ beginning apprentices, other than those necessary to meet the contractual minimum, or compel those who do so to accept any particular individual. Nor could such an obligation be created by any decree fashioned by this Court in their absence. Employers could refuse to hire beginning apprentices or refuse to hire women when referred without violating the terms of a decree ordering the JATC to adopt a revised referral system. Although such actions could violate an order requiring the implementation of an affirmative action plan to promote the indenturing of women, the employers are not sufficiently "indenti-

fied *** in interest" with the JATC to be bound by such a decree as non-party participants under Rule 65(d), Fed.R.Civ. P. Regal Knitwear Co. v. Board, 324 U.S. 9, 13-14 (1945); see Equal Employment Opportunity Commission v. Local Union No. 3, International Union of Operating Engineers, No. C-71-1277-RFP (N.D.Cal. March 16, 1977).

Employers thus have the ability to defeat any relief ordered in this action in three ways. First they may refuse to hire new apprentices at all, if they do not wish to accept individuals without first interviewing them. Under a revised referral system, the absence of applicants actively seeking to convince employers to hire beginning apprentices may tend to encourage this result. Of course, such action would eventually result in a reduction of the total number

of apprentices, and some employers would ultimately be forced to hire new apprentices in order to maintain the apprentice-journeyman ratios specified in the collective bargaining agreements and in the California statute governing projects undertaken pursuant to contracts with state and local government entities. Cal. Labor Code §1777.5 (West Supp. 1977). However, no evidence has been submitted to demonstrate the impact of these limitations on the hiring of new apprentices, in light of the large number of experienced apprentices presently unemployed, the inapplicability of the contractual provision to employers using less than five journeymen, and the numerous exemptions created by the statute.

Second, employers may, with the co-operation of union locals, hire unregis-

tered, nonunion apprentices, who may obtain sufficient experience and skill to be classified as journeymen and thus be accorded equal treatment at the hiring hall without regard to participation in defendant's program. Such apprentices would not, however, satisfy either the contractual or the statutory obligation to hire apprentices in specified ratios. See Master Agreements §40. Cal.Labor Code §1777.5, supra. Moreover, under United States Department of Labor regulations all contracts covering federally financed and assisted construction must include a clause requiring non-registered apprentices to be paid at a rate determined by the Secretary of Labor for the class of work actually performed, rather than the lower rate permitted for registered apprentices. 29 C.F.R. §5.5(a)(4)

(1976). Again, no evidence as to the overall impact of these provisions on the trade is before the Court.

Finally, assuming that these provisions will motivate employers to hire significant numbers of beginning registered apprentices, female applicants may still be rejected at a cost of two hours' pay, which may be estimated from the wage scale effective June 16, 1976, at approximately $21 each.[12] Plaintiffs have submitted substantial evidence which appears to show that it is the employers, not the JATC, who are

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12 The schedule of wages attached to the Northern California Home Builders Conference Master Agreement, Appendix 7 to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed September 9, 1976, shows a wage rate for beginning apprentices of $6.75 per hour and a schedule of contributions for fringe benefits totalling $3.80 per hour, for a total of $21.10 for the two hours of showup time.

responsible for the dearth of women in the carpentry trade. There is nothing in the record to indicate that the reasons presently given by employers for rejecting women would not persuade them to continue rejecting them at this slight additional cost.[13] It is not clear whether this tactic would violate any contractual obligations owed to the JATC, but even if it would, there is no suggestion in the record that the JATC has enforcement authority adequate to force recalcitrant employers to accept

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13 Defendant has suggested that the use of a closed list may have motivated local JATC employees to accelerate efforts to indenture minority apprentices in order to return to the free selection system once quotas were attained. This factor would almost certainly be outweighed in this case, however, by the documented reluctance of employers to hire women.

female applicants.[14]

The record does not reveal whether an applicant who is dispatched and rejected by the employer would become a registered apprentice. Assuming that he would, the ability of employers to reject those dispatched would not impede attainment of plaintiffs' announced goal of entry

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14 Defendant has stated that the JATC has some police authority and can withdraw the use of apprenticeship facilities from employers who hire unindentured apprentices. Memorandum of Points and Authorities RE: Indispensable Parties and the Jurisdiction of the Court, filed March 18, 1977, at 5. No document evidencing this authority is before the Court, and it is unclear whether the JATC could withdraw facilities from employers who do not bypass the referral system entirely but simply refuse to accept certain individuals. Even if this sanction is available, any attempt to impose it would place the JATC in the difficult position of having to prove the illegal motive of discrimination or face liability for refusing to provide services merely because the employer had exercised his contractual right to reject applicants "for any reason." Master Agreements §49(9).

into defendant's program. It would, however, prevent any meaningful participation in that program, since only schooling, not on-the-job training, would be available to women. Thus, the relief obtained in this lawsuit would serve only to swell the ranks of unemployed apprentices. This surely cannot be the "complete relief" contemplated by Rule 19(a).

It is no answer to these problems to say that plaintiffs seek limited relief in order that women may gradually integrate the trade, and that if future employer discrimination excludes women from the full benefits of apprenticeship, such women may seek legal redress against the responsible parties. The plain fact is that the opportunity to gradually integrate the trade exists now to the same extent and subject to the same

obstacles as it would under any decree that could be fashioned against the JATC alone. There is no evidence that the change in referral system sought here will have any effect on the apparent source of the discrimination alleged -- the absent employers. More women might indeed attain the status "registered apprentice," but to obtain jobs they would have to bring to court precisely the same parties who would be sued in the absence of any decree against the JATC.[15] Although the plaintiffs motive -- to avoid unnecessary taxing judicial

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15 In fact, a decree establishing a closed list referral system could hamper the process of obtaining relief against discriminating employers. Under the amended Annex C-1, any woman may seek work as a carpenter and file suit against each employer who rejects her because of her sex. Under the type of system sought by plaintiffs, the class of potential plaintiffs who may sue a given discriminating employer will be far more limited.

resources -- is a laudable one, the Court must conclude that it would be a misuse of those resources to pursue this action to a conclusion in the absence of parties without whom any relief would quite probably be a futile gesture.

None of the authorities cited by aplaintiffs [sic] supports a contrary result. The Court has been directed to only one case in which relief was afforded against a party which had used a non-party's discriminatory action as the vehicle for its own discrimination. Crockett v. Green, supra, 388 F.Supp.912. There, the City of Milwaukee was ordered to suspend a requirement that skilled tradesmen have completed a formal apprenticeship and a designated amount of journeyman experience prior to hiring, because past discrimination had prevented blacks from obtaining those qualifi-

cation. Since the effectiveness of that relief did not depend in any way on union participation, Crockett provides no precedent for the relief sought here. The analogy would be more apt if the City had there been ordered to require the union to accept more blacks into apprenticeship.

Plaintiff relies on decisions holding that relief may be granted against unions to modify discriminatory job referral systems in the absence of the affected employers. Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators, 525 F.2d 1354 (9 Cir. 1975); United States v. Sheet Metal Workers Intern. Ass'n, Local Union No. 36, 416 F.2d 123, 132 n.16 (8 Cir. 1969); United Minority Workers v. Intern. Union of Operating Engineers, 10 E.P.D. 10,581 (D.Ore. 1975); Butler v. Local No.

4 and Local No. 269, Laborers' Intern. Union, 308 F.Supp. 528 (N.D.Ill. 1969). None of these decisions, however, involved allegations of discriminatory conduct by the employers, a fact on which the courts expressly relied in both Kaplan, supra, 525 F.2d at 1361, and United Minority Workers, supra, 10 E.P.D. at 6402. Where, as in those two cases and in Butler, supra, only internal union policies were challenged,[16] there was no reason to fear that the relief would not be complete. A more substantial

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16 In Butler v. Local No. 4 and Local No. 269, Laborers' Intern. Union, supra, the court expressly rejected the union defendants assertion that plaintiffs sought the creation of a hiring hall, a remedy which would have required the cooperation of non-party employers. Instead, the court found that plaintiffs had alleged the existence of a de facto hiring hall and sought only to end the unions' discriminatory practices within that framework. 308F.Supp. at 532.

question was presented in Sheet Metal Workers, supra, in that the changes in referral practices ordered by the court required modifications in the collective bargaining agreement and thus were not possible without the cooperation of the employers. In apparent recognition that such relief could not be ordered against the unions alone, the Court of Appeals stated that compliance could be achieved by discontinuing those practices which were found to violate Title VII, presumably by abandoning the referral system altogether. In this case, no such resolution is possible, because the defendant's effective abandonment of its responsibility for referral is precisely the act complained of, and the underlying job requirement cannot be eliminated without altering the nature of the apprenticeship program itself.

Of more relevance to the instant case are decisions in which courts have found evidence suggesting that the absent party may have been responsible for the alleged discrimination, and have therefore ordered joinder. Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 52-53 (8 Cir. 1975); Evans v. Sheraton Park Hotel, 503 F.2d 177, 181 (D.C.Cir. 1974). Cf. Wright v. Stone Container Corp., 524 F.2d 1058, 1062 (8 Cir. 1975) (doubting adequacy of class representative who failed to join union whose policies contributed to creation of suspect practices); Equal Employment Opportunity Commission v. Eagle Iron Works, 8 E.P.D. p.9541, at 5356 (S.D.Iowa 1974) (mere signatory of collective bargaining agreement not indispensable party where no suggestion it has engaged in unlawful practices); Ostapowicz v.

Johnson Bronze Co., 369 F.Supp. 522, 531-532 (W.D.Pa. 1973), modified on other grounds, 541 F.2d 394 (3 Cir. 1976) (union need not be joined where discriminatory effect of collective bargaining agreement is caused solely by employer actions). See also Haas v. Jefferson National Bank, 442 F.2d 394, 397-398 (5 Cir. 1971) (absent party who participated in alleged unlawful conversion should be joined). Even where no responsibility for unlawful conduct is alleged, courts have recognized that relief may be ineffective where absent parties are "active participants" without whom a program challenged as discriminatory could not operate. Spirt v. Teachers Ins. and Annuity Ass'n of America, 416 F.Supp. 1019, 1022 (S.D.N.Y. 1976); McDonald v. General Mills, Inc., 387 F.Supp. 24, 38 (E.D.Cal. 1974). In

this case, the employers are not only participants in the apprenticeship program but indeed the allegedly principal cause of the discrimination complained of. Plainly here, as in Evans v. Sheraton Park Hotel, supra, the Court should decline the invitation to grant "rather ineffective symptomatic relief, leaving the root *** to continue." 503 F.2d at 181.

This determination alone is sufficient to require joinder. However, it should be noted that the second factor to be considered under Rule 19(a), the interest of the employers in the subject matter of the action, supports joinder as well. Under the present system employers enjoy the right to select their own beginning apprentices subject only to the requirement that the applicant be listed with the JATC in localities where the

original Annex C-1 is in effect. Even where there are no objective qualifications for a job, the interest of an employer in selecting those who, for any nondiscriminatory reason, he believes to be more highly motivated or more compatible with his existing work force, is not an insubstantial one. Nor does recognition of that interest require any assumption that women dispatched under a revised system would be less motivated or qualified in any way than men: the employers's interest in selection an employee of his own choosing would be violated by the dispatch of an undesirable man as much as by that of a similar woman. It is no doubt true that the "'unstandardized and subjective'" judgments presently being made "'lend themselves to arbitrary and discriminatory hiring'", Waters v. Furnco

Construction Corp., 551 F.2d 1085, 1089 (7 Cir. 1977), quoting Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 724 (8 Cir.), cert.denied, 414 U.S. 854 (1973), and plaintiffs have suggested that such results have occurred in this case. Nevertheless, the employers are entitled to their day in court to contest these allegations before the Court issues an order abolishing the prerogatives they presently enjoy.

Plaintiffs maintain that the employers here gave up their ability to protect this interest when they agreed to be bound by the trust agreement and thus delegated to the JATC the authority to establish apprenticeship programs. Although the terms of the instrument are unclear on this point, we may assume that the employers did thereby agree to submit to any referral system adopted by the

JATC. Even so, they retained a significant measure of control over the system selected, since they appoint half the members of the JATC and may bargain with the remaining union members. A court order instituting a new referral system will deprive them of this control. Of course, such an order would not wholly eliminate employer freedom to select apprentices, since they are always entitled to reject applicants referred. That freedom would, however, be constrained in two ways: it could be exercised only at the price of showup time; and the pool of applicants would be limited to those referred, one at a time, by the union. Any conceivable decree would thus practically impair the employer's ability to protect a significant interest in selectivity in hiring.

The fact that this interest stems

from a collective bargaining agreement does not, as plaintiffs suggest, render it irrelevant for purposes of Rule 19. None of the decisions cited for that proposition establishes any such per se rule: each court has examined the circumstances of the case to determine the actual effect of the action on the absent party, and a key consideration has been that the discriminatory conduct alleged is limited to the named defendant. Waters v. Heublein, Inc., supra, 11 E.P.D. at 6587; Rosario v. New York Times Co., 10 E.P.D. p.10,155, at 7704 (N.D.Ga 1975); Equal Employment Opportunity Commission v. Eagle Iron Works, supra, 8 E.P.D. at 5356; Ostapowicz v. Johnson Bronze Co., supra, 369 F.Supp. at 522, 531-532.

Nor does the presence of a party who is already defending employer interests

to some extent obviate the need for joinder. Though frequently mentioned, this factor has merely been one among many considered in determinations pursuant to Rule 19. See United States v. Navajo Freight Lines, Inc. 525 F.2d 1318, 1322 (9 Cir. 1975) (international and local unions); United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 310 (5 Cir. 1975), vacated on other grounds, 45 U.S.L.W. 4505 (1977) (international and local unions); United States v. St. Louis - San Francisco Railway Co., 52 F.R.D. 276, 280 (E.D.Mo.), rev'd on other grounds, 464 F.2d 301 (8 Cir. 1971), cert.denied, 409 U.S. 1107, 1116 (1973) (union and its members); United States v. Enterprise Ass'n of Steamfitters, 360 F.Supp. 979, 995 (S.D.N.Y. 1973) (trade association and its members). Here the JATC is a legal entity separate and

distinct from the employers and unions which created it. No agency relationship has been alleged, and the JATC's interests are not identified with those of the employers as are those of the entities dealt with in the cases cited above. In fact, the JATC has no independent interest in defending employer selectivity. Here, as in Grogg v. General Motors Corp., 12 E.P.D. p. 11,204 (S.D.N.Y. 1976), there simply are not adequate assurances of the unity of the various parties to hold joinder unnecessary on that ground. 12 E.P.D. at 5542.

Finally, decisions rejecting the claim that employers must be joined in suits seeking the elimination of discriminatory union referral practices are inapposite. In each such case the employers had already completely given up

their right to selectivity when they agreed to accept those persons dispatched by the union and retained no control over union methods of referral.[17] No case has been found which orders a union or apprenticeship committee to establish a hiring hall or adopt other measures limiting employer selectivity in hiring in the absence of the affected employers.

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17 In Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Operators, supra, 525 F.2d 1354, the Court did to some extent modify procedures for operation of a referral system which were set forth in a collective bargaining agreement, and thus not beyond employer control. However, the order affirmed in Kaplan merely required that the female plaintiff be placed on an existing roster which entitled photographers to preference in hiring, without altering the system of hiring or the degree to which employers were free to select their own employees. The only possible prejudice from the addition of one individual to a pool to which employers had already agreed to give preference was potential lack of qualifications, and the evidence indicated that employers considered the plaintiff qualified. 525 F.2d at 1361.

B. The Union Locals

The role of the union locals in the subject matter of this action is limited to the dispatch of beginning apprentices at the request of employers. Defendant argues that their presence is required by Rule 19(a)(1), because they are in a position to frustrate the effectuation of any relief by simply ignoring new JATC procedures and continuing to dispatch those individuals requested by employers. Although the extent of the unions contractual obligation to abide by procedures adopted by the JATC is unclear, in practice it appears that the JATC can enforce its selection of new apprentices by refusing to indenture any wrongly dispatched individual. Thus, to the extent that employers desire registered apprentices, the unions would be unable to satisfy that demand without

complying with the JATC procedures. The relief ordered in this action could be frustrated only to the extent that unregistered apprentices satisfy employer needs.

With respect to Rule 19(a)(2), the unions have an interest in the maintenance of an effective apprenticeship and training program which produces adequate numbers of competent apprentice and journeyman members. If, for the reasons discussed in Part II, A, supra, the decree of the Court were to result in either a significant decline in the number of apprentices employed or an increase in unemployment among apprentices, that interest would be significantly impaired.[18] Moreover, on

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18 Contrary to plaintiffs' assertion, the impairment of union interests goes beyond the mere dissatisfaction of "majority" (continued)

assumptions the unions would be entitled to demand that the JATC fulfill its obligation under the trust fund agreement to maintain an adequate apprenticeship program. The JATC would then be placed in the untenable position of choosing between two mutually exclusive obligations: to assure the indenturing of women pursuant to court order, and to maintain the program as required by contract.

On the present state of the record it is impossible to say with certainty that the relief sought here will reduce the total number of apprentices employed or increase unemployment among apprentices, thus requiring joinder under Rule 19(a)

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employees that may be anticipated in any Title VII case. See Phillips v. Carborundum Co., 361 F.Supp. 1016, 1020 (W.D.N.Y. 1973). Here, the order may prevent the satisfaction of obligations to all the unions' apprentice members and to the union itself.

(2), or increase the demand for unregistered apprentices, thus requiring joinder under Rule 19(a)(1). However, in light of plaintiffs allegations and supporting affidavits to the effect that employer reluctance to hire women is the real source of the discrimination alleged, the Court concludes that employer action leading to one or more of these results is sufficiently likely as to require joinder of the affected union locals.

IV. JOINDER

Defendant argues that joinder is barred by failure to name the absent parties in charges filed with the EEOC and failure to file suit against those parties within 90 days of receiving notice of right to sue, as required by 42 U.S.C. §2000e-5(f)(1). Neither of these omissions can prevent joinder in this

case.

Title VII's policy of encouraging conciliation and voluntary settlement in the first instance has led courts to formulate a rule that parties not named in an EEOC charge are not subject to suit. Thornton v. East Texas Motor Freight, 497 F.2d 416, 423 (6 Cir. 1974); LeBeau v. Libby-Owens-Ford Co., supra, 484 F.2d at 799; Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7 Cir. 1969). This policy-based rule is, however, subject to numerous exceptions in favor of conflicting policies, two of which are relevant here.

First, since EEOC charges are frequently filed without legal assistance at an early stage of the proceedings, it would frustrate the goals of Title VII to require procedural exactness in stating the charges. Kaplan v. Intern. Alliance

of Theatrical and Stage Employees and Motion Picture Machine Operations, supra, 525 F.2d at 1359. Thus, charges are to be construed with the utmost liberality, and parties names in the factual statement in sufficiently specific terms to apprise the EEOC of the source of the alleged discrimination may subsequently be joined in judicial proceedings. Id.; Sanchez v. Standard Brands, Inc., 432 F.2d 455, 562-463 (5 Cir. 1970). Here, both plaintiffs alleged that they were being denied membership in the "carpenters' union." As respondent, Ms. Eldredge named "carpenters Local 46, J.A.T.C.," and Ms. Mazur named Union 46, Carpenters Joint Apprenticeship Training Committee" These statements were plainly sufficient to apprise the EEOC of the union's involvement in the alleged discrimination and thus to support

joinder in this action.

Second, when application of the procedural bar would prevent joinder pursuant to Rule 19(a), important policies favoring enforcement of Title VII, judicial economy, and the rights of litigants would be frustrated by an inflexible rule. In such cases, considerations of "uniformity *** [and] of the time, effort and expense involved in duplication, with the possibility of inconsistent results" demand that the entire matter be disposed of in one proceeding. Bremer v. Saint Louis Southwestern Railroad Co., 310 F.Supp. 1333, 1340 (E.D.Mo. 1969). Joinder is thus plainly appropriate where no purpose of conciliation could have been served if the parties had been named. See Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc., 503

F.2d 1086, 1095 (6 Cir. 1974). Several courts have so held in situations where the absent party was not alleged to have been responsible for any discrimination, or would naturally have become involved in any efforts to conciliate. Grogg v. General Motors Corp., supra, 12 E.P.D. at 5542; Equal Employment Opportunity Commission v. Braswell Motor Freight Lines, Inc., 8 E.P.D. p. 9714 (N.D.Tex. 1974); Equal Employment Opportunity Commission v. Brotherhood of Painters, Decorators and Paperhangers, 384 F.Supp. 1264, 1268 (D.S.D. 1974); Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp. 313, 323 (D.Mass.), aff'd, 545 F.2d 222 (1 Cir. 1976). Here, it may be noted that no conciliation was attempted; consequently the failure to name the employers had no practical effect on this policy. Such a finding is

not necessary to joinder, however, for numerous courts have found that the interests represented by Rule 19 and by enforcement of Title VII simply outweigh the interest in conciliation:

> "However, we are not convinced that the value of conciliation supersedes the value of enforcement, to the end that after a charge has been processed before the EEOC and court action commenced, the district court is powerless to order joinder under Rule 19(a) and is further required to dismiss the action under the indispensable party provisions of Rule 19(b). Where, as here, the chartering International was an obscure party, requiring court action to determine whether or not its presence in the action was necessary for complete relief among those already parties, to deny joinder under 19(a) would cripple the rights of the charging party as well as those of the party charged." Evans v. Sheraton Park Hotel, supra, 503 F.2d at 183.

The absent employers here were "obscured" parties in the sense that

plaintiffs apparently did not know them to be a source of discrimination until long after the EEOC charges were filed. Even after the employers' role was identified, it was not unreasonable, in the absence of knowledge of the relationships among the parties, to assume that complete relief could be obtained from the JATC alone. That the absent parties were "obscure" in this sense has not, however, generally been found to be a prerequisite to joinder pursuant to Rule 19(a) despite the failure to name parties before the EEOC. Macklin V. Spector Freight Systems, Inc., 478 F.2d 979, 993 n.25 (D.C.Cir. 1973) (dictum); Equal Employment Opportunity Commission v. McLean Trucking Co., 525 F.2d 1007, 1012 (6 Cir. 1975) ("in-dispensable parties joined for purpose of interpreting collective bargaining

agreement); Held v. Missouri Pacific Railroad Co., 373 F.Supp. 996, 999 (S.D. Tex. 1974) (dictum that "indispensable" parties may be joined); Equal Employment Opportunity Commission v. Rexall Drug Co., 9 E.P.D. p. 9936, at 6931 (E.D. Mo. 1974); Ostapowicz v. Johnson Bronze Co., supra, 369 F.Supp. at 531 (dictum); Reyes v. Missouri-Kansas-Texas Railroad Co., 53 F.R.D. 293, 297 (D.Kan. 1971); Torockio v. Chamberlain Manufacturing Co., 51 F.R.D. 517, 519 (W.D.Pa. 1970) (joinder pursuant to Rule 21 where insufficient facts for Rule 19 joinder); Bremer v. Saint Louis Southwestern Railroad Co., supra, 310 F.Supp. at 1340. This line of authority disposes of defendant's claim that failure to name the employers in charges before the EEOC is fatal to joinder under the circumstances presented here.

The same policies dispose of defendant's second contention: that joinder is barred by plaintiffs' failure to add the employers and unions within 90 days of receipt of a right-to-sue letter. Defendant has cited no authority for the proposition that this statue of limitations will bar joinder of necessary parties pursuant to Rule 19. None of the decisions dealing with failure to name parties in EEOC charges, supra, addressed this issue, despite the fact that the statutory period will have run in most cases by the time a court has determined that absent parties must be joined. The Court concludes that the policies underlying Rule 19, which has been held to override the conflicting Title VII policy of conciliation, must also override the policy of finality expressed in this short limitations period.

Of course, a plaintiff cannot amend his complaint to allege an entirely new cause of action and add the parties necessary thereto after the period of limitations has passed. See Marlowe v. Fisher Body, 489 F.2d 1057, 1064 (6 Cir. 1973). But Title VII permits a claimant to seek judicial relief for "any discrimination like or reasonably related to the allegations of the EEOC charge," without returning to the agency for administrative consideration of the new charges. Equal Employment Opportunity Commission v. Pacific Press Publishing Association, supra, 535 F.2d at 1186; Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9 Cir. 1973). The present charge of maintaining a discriminatory referral system differs significantly from the original charge of discriminatory practices in placement of

applicants on lists. But the new charge does not change the Plaintiffs' basic contention: That discriminatory procedures in admission to defendant's apprenticeship program have drastically limited the ability of women to enter the carpentry trade. To anyone familiar with defendant's procedures, the shift in focus from the "list" to the "job" requirement for admission could reasonably have been expected to grow out of the original charge once information was made available as to the operation of the system. See Gamble v. Birmingham Southern Railroad Co., 514 F.2d 678, 688-689 (5 Cir. 1975); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 399 (3 Cir. 1976). Thus, the amendment was within the scope of the original charges, and any parties necessary to the adjudication thereof may be joined at

this time.

Although there is no procedural bar to joinder of the absent parties, the affected employers number in excess of 4500, and more than 60 local unions appear to be involved. Plaintiffs have represented that joinder is feasible without explaining how they intend to proceed in light of these numbers. The only alternatives appear to be certification of defendant classes or joinder of contractor association in lieu of individual employer members, and District Councils, the Carpenters 46 Northern Counties Conference Board, or the International itself in lieu of union locals. That either of these alternatives can provide a feasible and adequate solution to the problems raised in Part II, supra, is open to serious question. The former would raise a host

of questions under Rule 23, while the latter would raise further questions under Rule 19 as to whether individual employers and union locals remain indispensable parties despite the joinder of their representatives. Decision on these issues must, however, await plaintiffs' selection of a method of joinder and the submission of information not presently before the Court, including the precise number of employers affected, the number belonging to trade associations, the nature of those associations, their ability to represent and protect the interests of their members, and the relationships and respective roles of each of the various levels of union organization. Absent these facts, it is impossible to determine whether joinder may be accomplished as required by Rule 19(a).

If joinder cannot be accomplished, the facts discussed in Part III, supra, will require that the action be dismissed pursuant to Rule 19(b). Any relief directed to the JATC alone would create a substantial possibility of prejudice to both employers and unions, as well as to the JATC itself. No form of decree or protective provision sufficient to avoid or reduce this prejudice has been subbested, and the Court is aware of none. Most significantly, there is no evidence that a judgment rendered in the absence of these parties would have any significant effect on the evil complained of in this action. Plaintiffs' alternative remedy is, unfortunately, burdensome and expensive: to pursue in individual lawsuits those employers alleged to have discriminated. However, the Court cannot on this ground alone countenance any

further expenditure of judicial resources in an action so unlikely to lead to effective relief.

Plaintiffs have strenuously urged the joinder be postponed until after determination on the issue of liability. Although the court may have the power to join parties to participate in the formulation of relief, see United States v. Chesapeake & Ohio Railway Co., 471 F.2d 582, 592-593 (4 Cir. 1972), cert.denied, 411 U.S. 939 (1973); Pegues v. Mississippi State Employment Service, 57 F.R.D. 102, 105 (N.D.Miss. 1972), that procedure is appropriate only where, as in United States v. Chesapeake & Ohio Railway Co., supra, the presence of those parties cannot immediately be determined to be necessary for complete relief under Rule 19(a)(1). Where, as here, it is clear from the outset that effective

relief is impossible in the absence of the parties in question, it would be a monumental waste of resources to adjudicate the issue of liability before determining whether those parties can be joined. Moreover, where the absent parties claim interests that may be affected by a decree or that may generate relitigation, it is the exclusion of those parties from the liability phase of the litigation that may create the harms anticipated by Rule 19(a)(2). The proper course in such a case is plainly immediate joinder in order that all the issues may be litigated at one time. See Pegues v. Mississippi State Employment Service, supra, 57 F.R.D. at 105.

Accordingly, IT IS HEREBY ORDERED that defendant's motion to dismiss for lack of jurisdiction over the subject matter by reason of failure to exhaust

state and administrative remedies is denied.

IT IS HEREBY FURTHER ORDERED that the employer contributors to the Carpenters Apprenticeship and Training Trust Fund for Northern California, and the local unions which refer apprentices registered with the defendant JATC to employment are indispensable parties in whose absence the action cannot in equity and good conscience proceed. If they are not joined within sixty (60) days of the date of this order, or such further time as the Court may, on good cause shown, allow, the action will be dismissed.

Dated: November 2, 1977.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

ORIGINAL

Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1786

IN THE

SUPREME COURT OF THE UNITED STATES

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRUST BOARD,

Petitioner,

vs.

LINDA ELDREDGE, individually, and on behalf of all others similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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October Term, 1987

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Petitioner,

vs.

LINDA ELDREDGE, individually, and on behalf of all others similarly situated,

Respondents.

BRIEF IN OPPOSITION

TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari (hereinafter, "Petition") which seeks review of the Opinion of the United States Court of Appeals for the Ninth Circuit reported at 833 F.2d 1334 (9th Cir. 1987).

OPINION BELOW

The opinions below appear at 449 F.Supp. 506 (N.D. Cal. 1977), 83 F.R.D. 136 (N.D. Cal. 1979), rev'd. 662 F.2d 534 (9th Cir. 1981), cert. denied, 459 U.S. 917 (1982), and 833 F.2d 1334 (9th Cir. 1987).

STATEMENT OF THE CASE

In 1975 Respondent Linda Eldredge filed suit under Title VII of the Civil Rights Act of 1964 against Petitioner Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee and Trust Board (hereinafter, "Petitioner" or "JATC"), alleging that the JATC maintained entrance requirements to its carpentry apprenticeship program that discriminated against women on the basis of sex.

The JATC is a joint labor management committee that was created to administer the apprenticeship program for the carpentry trade in the forty-six northern California counties. The JATC is an independent legal entity created by a Trust Agreement. The Trust Agreement grants full authority to the JATC to structure the carpentry apprenticeship program and to select apprentices. See A-2 of Appendix to Petition, 833 F.2d at 1335.

Since 1975, the JATC has established and maintained uniform admission requirements and procedures for its apprenticeship and training program. Beginning in August, 1975 the JATC plan required an applicant for its carpentry apprenticeship program (1) to have passed his or her seventeenth birthday; (2) to have a high school diploma or G.E.D. equivalent; (3) to obtain a listing on one of the JATC's new applicant referral lists[1] and (4) to obtain a commitment of employment from

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[1] Originally, an individual could only obtain a listing on a JATC new applicant referral list during a specified, limited period of time when the JATC's program was open to new applicants. In November, 1976, the JATC's admission plan was amended so that at any time any applicant who met the age and education requirements could obtain a listing on a JATC new applicant referral list.

an employer who subscribed to the JATC's apprenticeship program (i.e., from a union contractor). No prior carpentry experience or training is required. See A-2 - A-3 of Appendix to Petition, 833 F.2d at 1335, and n. 6 at A-20 of Appendix to Petition, 833 F.2d at 1339, n. 6.

The JATC authorized two methods for an applicant to obtain the requisite commitment of employment. Under one method a contractor may request the carpenters' union to provide a beginning apprentice, but not a particular named individual. The carpenters' union then dispatches an applicant apprentice by obtaining from the JATC the name of the new applicant apprentice that appears at the top of the JATC new applicant referral list. Very few applicants obtained work through this method. Under the second authorized method to secure employment an applicant is permitted to find an employer willing to provide the applicant with a job and to request that applicant by name from the carpenters' union. This method, known in the industry as the "hunting license" system, is the one through which the vast majority of indentured apprentices obtained their first jobs and gained admission to Petitioner's carpentry apprenticeship program. See A-3 of Appendix to Petition, 833 F.2d at 1335-36. Although a newly indentured apprentice may lose his or her requisite first job within one day of gaining admission to the program, the job loss does not affect his or her apprenticeship status. Once an applicant becomes an indentured apprentice he or she is eligible for future job referrals through the union out-of-work apprentice list. See n. 9 at A-27 of Appendix to Petition, 833 F.2d at 1340, n. 9.

For the years 1976 through 1984, 20.9% of the female applicants and 38.8% of the male applicants to the JATC's program became indentured apprentices. The female admission rate was about 54% of the male admission rate. See n.7 at A-21 of Appendix to Petition, 833 F.2d at 1339, n. 7.

In 1975 Respondent Linda Eldredge applied to the JATC's program. She met that JATC's age and educational requirements and obtained the requisite listing on a JATC new applicant referral list. She was unable to secure a job with a union contractor and, as a result, was never indentured into the JATC apprenticeship program. In 1977 Respondent Eldredge filed an amended complaint alleging that the "hunting license" system has a disparate impact on the admission of women to the JATC's program and that it was a violation of Title VII. In 1979 the district court dismissed the case under Rule 19, Federal Rules of Civil Procedure, for the failure to join the 4,500 potential employers of apprentices as defendants. Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee and Trust Board, 440 F.Supp. 506 (N.D. Cal. 1977) and 83 F.R.D. 136 (N.D. Cal. 1979). The decision was reversed and the case was remanded at 662 F.2d 534 (9th Cir. 1981), cert. denied, 459 U.S. 917 (1982).

On remand, the plaintiff class was certified. The case was bifurcated for trial. Shortly before the liability trial was to begin both sides moved for summary judgment. The Petitioner's motion for summary judgment was granted. The Respondents' motion for summary judgment on the question of JATC liability was denied. See

Appendix C to Petition. The Ninth Circuit reversed and ordered the district court to enter summary judgment for the Respondents' class on the issue of Title VII liability based on the JATC's use of the hunting license system and the Ninth Circuit remanded the case for trial to determine the appropriate remedy.

REASONS FOR DENYING WRIT

Introduction

The Petition should be denied because it does not seek review of any issue which is in conflict among the Courts of Appeals, because it presents no novel, significant legal issue and because this case turns on its own facts.

A. PETITIONER'S ENTRANCE REQUIREMENT VIOLATES TITLE VII BECAUSE IT HAS A DISPARATE IMPACT ON THE ADMISSION OF WOMEN TO PETITIONER'S APPRENTICESHIP PROGRAM; ELIMINATION OF THE DISCRIMINATORY ENTRANCE REQUIREMENT WILL AFFORD RELIEF TO RESPONDENTS' CLASS

The Ninth Circuit Court of Appeals found Petitioner liable under Title VII for maintaining an entrance requirement that has a significant disparate impact on the admission of women to Petitioner's carpentry apprenticeship program. The Court found that Petitioner had not justified its reliance on the entrance requirement as a "business necessity" and, additionally, that alternatives existed which would satisfy the alleged purposes of the challenged entrance requirement.

Petitioner's argument that the decision "calls for an unwarranted extension of liability under Title VII" (Petition, page 9) ignores both the language of the statute and the case-law of this Court interpreting it.

42 U.S.C. Section 2000e-2(d) provides, in pertinent part, that:

> It shall be an unlawful practice for any . . . joint labor-management committee controlling apprenticeship or other training . . . to discriminate against any individual because of . . . sex . . . in admission to . . . any program established to provide apprenticeship or other training.

The entrance requirement at issue here violated Title VII because it is a "facially neutral employment practice" that has a "significantly disproportionate impact" on a group protected by Title VII. Connecticut v. Teal, 457 U.S. 440, 446 (1982), Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

Simple elimination of the discriminatory entrance requirement[2/] will afford the primary relief Respondents seek. Petitioner's argument that the disparate impact of its entrance requirement is the result of sex discrimination practiced by employers finds no evidentiary support in the record. Moreover, the reason that a facially neutral practice has a disparate impact is not

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[2/] The "facially neutral practice" at issue here is the requirement that applicants secure a job with a union contractor in order to gain admission to Petitioner's apprenticeship program and, more specifically at issue, is the Petitioner's reliance on the "hunting license" system as a means for applicants to secure their first jobs. Under that system applicants may seek out employers on their own who will agree to hire them.

In fact, Petitioner has maintained an alternative to the hunting license system for applicants to secure the requisite first job. Under the alternative system applicants are referred anonymously to union contractors from the Petitioner's new applicant referral lists. According to Petitioner, the requirement that an applicant secure a job before Petitioner will indenture him or her is in place to increase the chances that indentured apprentices will have on-the-job carpentry training while receiving Petitioner's carpentry classroom instruction. Petitioner's alternative anonymous referral system can serve this purpose.

relevant to determining Title VII liability, unless the reason is pertinent to establishing a business necessity defense. Petitioner herein failed entirely to justify as a business necessity its reliance on the hunting license system as a means of screening applicants. See Appendix, A-26 - A-36, to Petition, 833 F.2d at 1340-41.

Although Petitioner had the opportunity to do so in connection with presenting a business necessity defense, it introduced no evidence whatsoever that any employer or employers had in the past or planned in the future to discriminate against women apprentices in hiring. Petitioner's argument that sex discrimination on the part of employers caused the disparate impact of the hunting license system and that such presumed employer sex discrimination would doom to failure any alternative entrance requirement is devoid of any evidentiary basis.[3/]

On remand discovery will ensue on the question of appropriate relief for Respondents' class. At the trial on relief for the class Petitioner will have the opportunity and the duty to present any evidence it has that any particular alternative or alternatives to the hunting license system are not feasible.

[3/] It may be that the disparate impact of the hunting license system is the result of intentional sex discrimination practiced by the JATC. Perhaps Petitioner provides a proportionately higher number of male applicants than female applicants with information about employers that are in the process of hiring applicant apprentices. Or, it may be that male applicants, through their jobs and social contacts, have better connections to union contractors than do female applicants. These possible explanations for the disparate impact, like the one offered by Petitioner, are mere speculations.

B. A SIGNIFICANT DISPARITY BETWEEN THE INDENTURE RATES OF MALE AND FEMALE APPLICANTS TO PETITIONER'S PROGRAM ESTABLISHED A PRIMA FACIE CASE OF SEX DISCRIMINATION

The Court of Appeals found that a significant disparity existed between the indenture rates of male and female applicants to Petitioner's program and that it was the hunting license sytem that caused the disparity. See A-19 of Appendix to Petition, 833 F.2d at 1338. The male and female applicant and indenture figures were supplied by Petitioner. The rates show that between 1976 and 1984 there were 54,344 male applicants and 3,140 female applicants to Petitioner's program. Of the male applicants 21,066 or 38.8% were indentured while of the female applicants only 657 or 20.9% were indentured. The female indenture rate was 54% of the male indenture rate. See A-20 - A-21 of Appendix to Petition, 833 F.2d at 1339.

The Ninth Circuit found that the hunting license had a disparate impact on women by following the EEOC guidelines on adverse impact which have been recognized by this Court in Connecticut v. Teal, supra, 457 U.S., n. 4 at 443. See A-21 - A-23 of Appendix to Petition, 833 F.2d at 1339.

Petitioner implies erroneously that the Ninth Circuit had compared women's indenture rates into its apprenticeship program with "the percentage of females as opposed to males in the society at large." Page 12 of Petition. This is simply not true. Having misread and, as a result, misrepresented the Ninth Circuit opinion in this case, Petitioner inappropriately relied on the case of Janowiak v. City of South Bend, 836 F.2d

1034 (7th Cir. 1987) at pages 13 - 14 of Petition. The Janowiak decision considers an issue not involved in the instant case. That issue is whether conditions existed in the City of South Bend which justified the City's voluntary adoption of an affirmative action plan. The Court found such conditions were not present and that South Bend, before implementing its plan, had not made the appropriate "statistical comparison that focuses on the relevant qualified area labor pool . . .." Id., 836 F.2d at 1039.[4/]

Unlike in Janowiak, the Ninth Circuit in this case follows conservatively the dictates of this Court. See Hazelwood School District v. United States, 433 U.S. 299, 308-09, and n. 13 at 308 (1977) and International Brotherhood of Teamsters v. United States, 431 U.S. 324, 337-38, n. 17 (1977). Although the qualifications for entrance into Petitioner's apprenticeship program are minimal (Petitioner requires applicants to be at least seventeen years of age and to have a high school diploma or G.E.D. equivalent) and are qualifications held by vast members of the general population, the statistical comparisons in this case were based on a labor pool limited to the actual applicants who met Pecitioner's age and educational requirements. In fact there is no more limited appropriate labor pool and Petitioner has never defined one that would be more appropriate.

[4/] That Petitioner has even alluded in any Court below to the argument it makes to this Court that Respondents' statistics were based on an incorrect labor pool is, at best, highly questionable.

C. PETITIONER'S ARGUMENTS CONCERNING POTENTIAL DIFFICULTIES IN DETERMINING APPROPRIATE RELIEF FOR INDIVIDUAL CLASS MEMBERS ARE PREMATURE AND WERE NOT RAISED IN ANY COURT BELOW

Arguments in the Petition concerning potential difficulties in ascertaining appropriate relief for individual class members were not made in any Court below and are premature. Such matters will be taken up by the district court when the trial on classwide relief occurs.

CONCLUSION

For all the foregoing reasons Respondents respectfully request that the Petition be denied.

Dated: May 20, 1988

Respectfully submitted,

Alberta M Blumin

ALBERTA M. BLUMIN
Attorney for Respondents

No. 87-1786

IN THE

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Respondents.

Certificate of Service

I hereby certify that on this 23rd day of May, 1988, four copies of Respondents' Brief In Opposition to Petition for Certiorari were mailed, postage fully prepaid, to Moore, Sizoo & Cantwell, 1111 Civic Drive, Walnut Creek, CA 94596, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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